

THE ALL INDIA REPORTER

1920

BOMBAY SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE BOMBAY HIGH COURT
REPORTED IN

I. L. R. 44 BOMBAY (2) 22 BOMBAY LAW REPORTER
(1) 21 CRIMINAL LAW JOURNAL (4) 54 to 58 INDIAN CASES

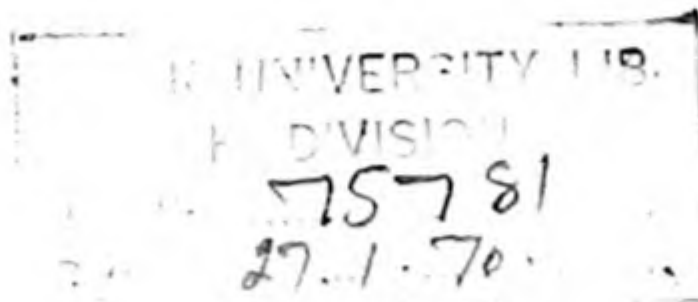
CITATION : A. I. R. 1920 BOMBAY

S. N. Dar
Advocate High Court
Jammu & Kashmir

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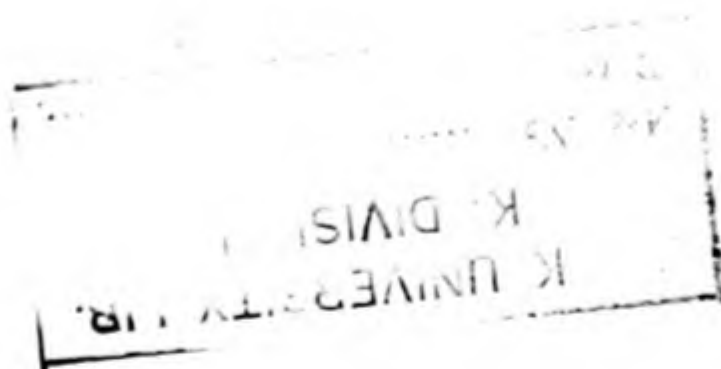
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To
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT



J. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

BOMBAY HIGH COURT
1920

Chief Justices:

The Hon'ble Sir Norman Macleod, Kt, B. A. (Oxon), Bar-at-Law.

„ „ John Heaton, Kt. (*Acting*)

Puisne Judges:

The Hon'ble Sir John Heaton, Kt.

„ „ Lallubhai Asharam Shah, Kt, M.A., LL.B.

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„ „ L. C. Crump, I. C. S. (*Addl.*)

„ Sir Chimanlal H. Setalvad, Kt. (*Addl.*)

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ALL INDIA REPORTER

1920

BOMBAY HIGH COURT

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*** Indicates Cases of Great Importance.**

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THE ALL INDIA REPORTER

1920 BOMBAY COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1920 with corresponding references of the ALL INDIA REPORTER.

Table No. II—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1920 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1920 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing serially the pages of INDIAN LAW REPORTS, BOMBAY SERIES, for the year 1920 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 44 BOMBAY.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 44 Bombay=All India Reporter.

ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.
1	1920 B 294	223	1920 B 306	443	1920 B 174	593	1920 B 109	780	1920 B 256
6	" " 251	227	" " 261	446	" " 225	602	" " 134	797	" " 156
34	" " 331	231	" " 333	451	" " 105	605	" " 131	832	" " 13
42	" " 85	234	" " 330	454	" " 112	609	" " 148	840	" " 71
44	" " 101	237	" " 41	459	" " 284	614	" " 350	848	" " 20
50	" " 130	255	" " 345	463	" " 350	619	" " 141	852	" " 166
55	" " 115	261	" " 357	466	" " 67	621	" " 103	860	" " 132
61	" " 235	267	" " 417	472	" " 60	625	" " 94	871	" " 137
82	" " 337	272	" " 309	474	" PC 61	627	" " 115	877	" " 415
88	" " 315	283	" " 296	483	" B 97	631	" " 192	881	" " 46
97	" " 208	297	" " 238	488	" " 355	673	" " 58(1)	887	" " 313
104	" " 418	304	" " 73	493	" " 120	"	" " 58(2)	895	" " 50
110	" " 127	321	" " 335	496	" " 141	682	" " 19	903	" " 11
120	" " 147	327	" " 354	500	" " 48	686	" " 311	907	" " 187
130	" " 150	331	" " 105	508	" " 27	690	" " 51	924	" " 245
139	1919 PC 20	341	" " 341	515	" " 64	696	" " 139	934	" " 61
150	1920 B 153	346	" " 361	527	" " 21	698	" " 96	939	" " 29
159	" " 221	352	" " 90	542	" " 142	702	" " 12	943	" " 26
166	" " 241	356	" " 202	544	" " 118	705	" " 155	947	" " 69
175	" " 269	372	" " 241	551	" " 30	710	" " 143	950	" " 87
179	" " 236	377	" " 259	555	" " 419	720	" " 84	954	" " 39
185	" " 205	385	" " 292	566	" " 261	727	" " 145	961	" " 117
192	" " 244	392	" " 413	574	" " 37	733	" " 93	967	" " 104
198	" " 308	400	" " 300	582	" " 62	733	" " 8	972	" " 203
202	" " 32	405	" " 249	586	" " 69	742	" " 1	977	" " 223
214	" " 333	410	" " 15	591	" " 127	767	" " 54	981	" " 56
217	" " 267	418	" " 163	595	" " 67	775	" " 334	986	" " 121

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N. B.—Column No. 1 denotes pages of others JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

22 Bombay Law Reporter=All India Reporter.

BLR)	A. I. R.	BLR)	A. I. R.	BLR)	A. I. R.	BLR)	A. I. R.	BLR)	A. I. R.
1	1919 PC 24	254	1920 B 73	659	1921 B 164	906	1920 B 18	1188	1921 B 278
7	" " 39	266	" " 32	665	" " 23	918	1921 " 189	1190	" " 251
13	1920 B 168	275	" " 41	670	" " 285	916	1920 " 61	1193	" " 229
31	" " 174	289	" " 105	680	1920 " 1	919	" " 71	1195	" " 147
33	" " 333	296	" " 90	698	" " 343	926	1921 " 307	1196	" " 408
35	" " 130	307	" " 15	704	" " 355	938	1920 " 20	1199	" " 407
39	" " 115	313	" " 413	708	" " 140	936	" " 26	1202	" " 309
44	" " 267	319	" " 11	711	" " 78	939	" " 29	1207	" " 144
49	" " 269	322	" " 58(1)	717	" " 261	942	" " 69	1212	" " 208
52	" " 205	"	" " 58(2)	723	" " 15	943	" " 127	1214	" " 395
57	" " 244	328	" " 54	725	" " 37	948	" " 87	1221	" " 166
61	" " 308	334	" " 67	732	" " 62	951	" " 9	1224	1920 " 339
64	" " 335	338	" " 346	735	" " 64	953	" " 95	1229	" " 319
68	" " 306	343	" " 187	743	" " 10	959	" " 99	1234	1921 " 323
71	" " 295	355	" " 409	746	" " 67	965	" " 82	1239	" " 366
76	" " 264	361	" " 245	747	" " 21	970	" " 113	1241	" " 59
79	" " 338	368	" " 175	759	" " 30	974	" " 110	1247	1920 " 270
82	" " 360	383	" " 60	762	" " 142	979	" " 117	1274	" " 371
86	" " 333	385	" " 48	764	" " 69	982	" " 39	1286	" " 358
88	" " 380	390	" " 27	768	" " 81	987	" " 50	1289	1921 " 384
91	" " 354	396	" " 19	771	" " 85	992	" " 46	1293	" " 399
94	" " 345	399	" " 51	774	" " 109	997	" " 104	1297	1920 " 232
99	" " 357	403	" " 12	777	" " 127	1001	" " 85	1299	1921 " 393
102	" " 417	406	" " 88	780	" " 118	1005	" " 281	1304	" " 127
106	" " 361	410	" " 98	785	" " 137	1012	1921 " 267	1306	" " 137
110	" " 219	415	1921 " 417	787	" " 134	1018	" " 238	1309	" " 380
113	" " 202	420	Too old.	790	" " 131	1040	" " 374	1313	1920 PC 139
118	" " 332	429	1919 PC 20	793	" " 148	1048	" " 310	13 5	1921 " 125
120	" " 341	437	" " 42	798	" " 351	1070	" PC 59	1319	" " 112
124	" " 241	444	" " 44	801	" " 141	1077	" B 211	1332	" " 71
127	" " 259	451	" " 60	802	" " 350	1079	1920 " 369	1343	" " 91
133	" " 215	457	" " 62	806	" " 139	1082	1921 " 257	1348	1920 " 12
136	" " 249	477	" " 75	808	" " 84	1089	1920 " 307	1357	" " 39
140	" " 369	488	" " 79	811	" " 101	1092	" " 363	1359	1921 " 88
143	" " 225	498	" " 52	812	" " 103	1093	1921 " 282	1362	" " 93
146	" " 235	507	" " 100	815	" " 96	1097	1920 " 203	1370	" " 50
149	" " 312	521	" " 55	817	" " 115	1101	" " 223	1377	" B 389
154	" " 300	531	" " 129	819	" " 94	1104	" " 214	1383	" " 289
157	" " 367	538	1920 " 65	822	" " 155	1107	" " 207	1387	" " 379
166	" " 402	541	" " 64	826	" " 145	1111	1921 " 63	1389	" " 256
184	" " 314	545	" " 61	831	" " 148	1114	1920 " 215	1394	" " 324
188	" " 318	550	Too old	838	" " 8	note	" " 424	1396	1920 " 210
190	" " 292	552	1920 PC 60	842	1921 " 185	1117	" " 411	1400	1921 " 301
195	" " 350	553	" " 79	846	1920 " 152	1120	" " 426	1403	1920 " 229
197	" " 311	557	" " 81	849	" " 164	1123	" " 427	1407	1921 " 219
200	" " 415	563	" " 43	860	" " 263	1126	" " 233	1409	" " 228
203	" " 238	568	" " 56	863	1921 " 195	1131	1920 " 265	1413	" " 227
209	" " 97	578	" " 67	869	" " 204	1136	" " 205	1416	" " 191
212	" " 105	586	" " 51	872	" " 200	1142	" " 51	1420	" " 40
214	" " 112	596	" " 46	874	" " 203	1147	" " 413	1429	" " 56
217	" " 321	606	" " 86	880	1920 " 31	1155	" " 161	1431	1920 " 191
219	" " 284	609	" " 29	884	1921 " 435	1158	" " 297	1435	1921 " 28
223	" " 120	619	" B 121	889	" " 155	1162	" " 181	1439	" " 403
226	" " 141	633	" " 166	892	" " 249	1165	1920 " 320	1442	" " 189
229	" " 135	640	" " 132	894	1920 " 63	1169	" " 128	1446	" " 35
232	" " 153	648	" " 53	898	1921 " 425	1173	" " 125	1450	" " 65
238	" " 208	650	" " 56	900	" " 162	1176	" " 125	1452	" " 48
243	" " 418	650	1921 " 198	904	" " 322	1181	1920 " 220	1464	" " 32
247	" " 127	654							

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1920, BOMBAY SECTION, with corresponding references of other REPORTS, JOURNALS and PERIODICALS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1920 BOMBAY. Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1920 Bombay=Other Journals.

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
1	Bom 742	48	Bom 500	84	I C 592	117	Bom 961
58	I C 257	57	I C 76	85 (1)	Bom 42	58	I C 406
22	B L R 680	22	B L R 385	54	I C 495	22	B L R 979
8	Bom 738	50	Bom 895	21	B L R 1084	118	Bom 544
57	I C 988	22	B L R 987	21	Cr L J 95	57	I C 534
22	B L R 838	58	I C 411	85 (2)	B L R 771	22	B L R 780
9	B L R 951	51	Bom 690	57	I C 525	120	Bom 493
58	I C 326	57	I C 79	87	Bom 950	55	I C 939
10	B L R 743	22	B L R 399	58	I C 323	22	B L R 223
57	I C 430	53	B L R 648	22	B L R 948	121	Bom 986
11	Bom 903	58	I C 226	88	B L R 406	55	I C 205
22	B L R 315	54	Bom 767	57	I C 129	22	B L R 619
56	I C 424	56	I C 455	90	Bom 352	127 (1)	Bom 591
12	Bom 702	22	B L R 328	56	I C 319	57	I C 532
22	B L R 405	56	Bom 981	22	B L R 296	22	B L R 777
57	I C 125	58	I C 221	94	Bom 625	127 (2)	Bom 110
13	Bom 832	22	B L R 65	57	I C 598	58	I C 198
22	B L R 906	53 (1)	Bom 673	22	B L R 819	22	B L R 247
58	I C 88	56	I C 449	95	B L R 953	130	Bom 50
15 (1)	B L R 723	22	B L R 322	58	I C 377	54	I C 670
57	I C 414	58 (2)	Bom 673	44	Bom 698	22	B L R 35
15 (2)	Bom 410	56	I C 450	57	I C 57	131	Bom 605
56	I C 419	22	B L R 322	22	B L R 815	22	B L R 790
22	B L R 307	60	Bom 472	44	Bom 483	57	I C 544
19	Bom 682	56	I C 597	55	I C 964	132	Bom 860
57	I C 116	22	B L R 383	22	B L R 209	58	I C 217
22	B L R 396	61	Bom 934	44	Bom 733	22	B L R 640
20	Bom 848	58	I C 96	57	I C 135	134	Bom 602
58	I C 38	22	B L R 916	22	B L R 410	57	I C 540
22	B L R 933	62	Bom 582	22	B L R 959	22	B L R 787
21	Bom 527	57	I C 423	58	I C 331	135	B L R 229
57	I C 433	22	B L R 735	101 (1)	B L R 811	55	I C 952
22	B L R 747	63	B L R 894	57	I C 579	137 (1)	B L R 785
26	Bom 943	58	I C 145	101 (2)	Bom 44	57	I C 538
58	I C 42	21	Cr L J 721	54	I C 573	137 (2)	Bom 871
22	B L R 936	64	Bom 515	21	B L R 1085	58	I C 319
27	Bom 508	57	I C 426	44	Bom 621	22	B L R 943
57	I C 113	22	B L R 735	57	I C 582	139	Bom 696
22	B L R 390	67 (1)	Bom 595	22	B L R 812	57	I C 590
29	Bom 939	57	I C 432	104	Bom 967	22	B L R 806
58	I C 45	22	B L R 746	58	I C 395	140	I C 270
22	B L R 939	67 (2)	Bom 466	22	B L R 997	22	B L R 708
30	Bom 551	56	I C 459	105 (1)	Bom 451	141 (1)	Bom 619
57	I C 440	22	B L R 331	57	I C 557	57	I C 556
22	B L R 759	69 (1)	Bom 947	22	B L R 212	22	B L R 801
31	B L R 880	22	B L R 942	105 (2)	Bom 331	141 (2)	Bom 496
58	I C 27	58	I C 48	56	I C 340	55	I C 949
32	Bom 202	69 (2)	Bom 586	22	B L R 289	22	B L R 226
56	I C 399	57	I C 447	44	Bom 598	142	Bom 542
22	B L R 266	22	B L R 764	57	I C 530	57	I C 472
35	B L R 1001	71	Bom 840	22	B L R 774	22	B L R 762
58	I C 992	58	I C 65	110	B L R 974	143	Bom 710
37	Bom 574	22	B L R 919	58	I C 394	58	I C 574
57	I C 417	44	Bom 204	112	Bom 454	22	B L R 831
22	B L R 725	56	I C 361	57	I C 571	145	Bom 727
39	Bom 954	22	B L R 254	22	B L R 214	57	I C 553
22	B L R 982	78	B L R 711	22	B L R 970	22	B L R 826
58	I C 419	58	I C 272	58	I C 391	147	Bom 120
41	Bom 237	81	B L R 768	115 (1)	Bom 627	54	I C 98
56	I C 411	57	I C 443	57	I C 573	21	B L R 1159
22	B L R 275	82	B L R 965	22	B L R 81	148	Bom 609
46	Bom 881	58	I C 384	115 (2)	Bom 55	57	I C 549
58	I C 415	84	Bom 720	54	I C 689	22	B L R 793
22	B L R 992	22	B L R 808	22	B L R 39	150	Bom 130

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150	54	I C 105	220	22	B L R 1181	267	14	Bom 217	320	55	I C 334
	21	B L R 1166		59	I C 458		54	I C 693		22	B L R 88
152	22	B L R 846	221	44	Bom 159		22	B L R 44	331	44	Bom 34
	57	I C 991		54	I C 481	269	44	Bom 175		53	I C 167
153	14	Bom 150		21	B L R 1096		22	B L R 49		21	B L R 861
	55	I C 956		21	Cr L J 81		55	I C 271	332	55	I C 540
	22	B L R 232	223	44	Bom 977	270FB	59	I C 324		22	B L R 118
155	14	Bom 705		59	I C 366		22	Cr L J 68	333 (1)	44	Bom 211
	57	I C 601		22	B L R 1101		22	B L R 1247		54	I C 667
	22	B L R 822	224	21	B L R 1101	281	22	B L R 1005		22	B L R 33
156	44	Bom 797		54	I C 485		59	I C 996	333 (2)	44	Bom 231
	59	I C 621		21	Cr L J 85	284	44	Bom 459		55	I C 355
	21	B L R 1014	225	44	Bom 446		55	I C 831		22	B L R 86
164	22	B L R 849		55	I C 624		22	B L R 219	334	44	Bom 775
	57	I C 957		22	B L R 143	285	44	Bom 61		58	I C 433
166	44	Bom 852	226	21	B L R 1130		53	I C 372		21	B L R 1126
	58	I C 213		54	I C 134		21	B L R 934	335	44	Bom 321
	22	B L R 633	229	22	B L R 1403	292	55	I C 857		55	I C 322
168FB	14	Bom 418		59	I C 783		44	Bom 385		22	B L R 64
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BOMBAY HIGH COURT

* A. I. R. 1920 Bombay 1

MACLEOD, C. J., HEATON AND SHAH, JJ.

Fakirappa Limanna Patil — Defendant—Appellant.

v.

Lumanna Mahadu Dhamnekar—Plaintiff—Respondent.

Second Appeal No. 636 of 1918, Decided on 19th December 1919, from decision of Dist Judge, Belgaum, in Appeal No. 270 of 1917.

* Limitation Act (9 of 1908), Art. 44—Alienation by mother as natural guardian—Alienation has to be set aside before recovery of possession—Suit is governed by Art. 44—Hindu law, Minor.

Where a Hindu mother, acting as the natural guardian of her minor son, transfers property during his minority, the minor, in order to recover possession of the property so transferred, must sue to set aside the transfer, and such suit must be brought within three years of the minor attaining majority under Art. 44, and if he fails to bring such suit within that time, neither he nor the next reversioner can dispute the alienation. [P 6 C 1]

A. G. Desai—for Appellant.

D. R. Manerikar—for Respondent.

Macleod, C. J.—The plaintiff sued to recover khas possession of the suit property after setting at naught all the contentions of the defendant or to redeem the suit property after taking account of the mortgage. The suit property belonged to one Nane, who died leaving a widow Sidubai and a son Omana. Nana had mortgaged the property to the father of the defendant in 1877. Omana died on 25th April 1901 leaving a widow Gopika who died in 1908. The plaintiff is admittedly the nearest reversioner and he sued to redeem the mortgage of 1877. It appears however that on 1st February 1920 B/1 & 2

1891 Sidubai purporting to act as guardian of Omana sold the equity of redemption to the defendant's father.

The lower Court found that the sale by Sidubai was for legal necessity and dismissed the plaintiff's suit with costs.

In appeal the learned appellate Judge considered that there was not sufficient evidence to show that the sale was for legal necessity, and it followed from that that Omana could have maintained the suit, in his opinion for redemption. Therefore he considered that the plaintiff as the nearest reversioner could sue for redemption, and passed a preliminary decree.

The question does not seem to have been argued in the lower appellate Court whether Omana was not barred by Art. 44, Limitation Act. The learned Judge seems to have assumed that the minor on attaining majority could have sued the mortgagee for redemption without first getting rid of the sale by his mother of the equity of redemption. This question was considered by my brother Shah and myself in Second Appeal No. 1001 of 1917, decided on 26th September 1919 and the matter was then very fully argued before us, but as we were of opinion that the sale by the minor's guardian was justified, we did not decide the point of limitation. Now however the same question has arisen again, and in this case as it has been found that the sale was not for legal necessity the success of the defence must depend on the question of limitation.

In *Laxmava v. Rachappa* (1) a minor's mother and natural guardian sold his

(1) [1918] 42 Bom. 626=46 I. C. 22.

property. The suit was brought to set aside the sale more than three years after the minor attained majority: it was held that the suit was barred under Art. 44, Limitation Act. Reference was made to the case of *Balappa Dundappa v. Chanbasappa Shivalingappa* (2). There the transaction which was disputed was a sale by a step-mother who purported to act as guardian of her minor stepson. The learned Chief Justice in his judgment says:

"It appears to us extremely doubtful if Art. 44, Limitation Act, has any application in circumstances such as we have here. The step-mother cannot be in a better position than any other manager to deal with immovable property which is not her own, as appears from the case of *Hunoomanpersaud Panday v. Mt. Babooee Munraj Koonweree* (3) which was a case of a mortgage by a mother. A mother or stepmother whether a Hindu or otherwise, purporting to act on behalf of a minor son, is, to use the words of S. 3, T. P. Act, a person authorized only under circumstances in their nature variable to dispose of immovable property, and the onus of proving authority arising from necessity or apparent authority arising from that cause, justified by reasonable inquiry, is upon the person who tries to assert the transfer against a minor."

Beaman, J., in *Laxmava v. Rachappa* (1) said:

"The case of *Balappa Dundappa v. Chanbasappa Shivalingappa* (2) and the case of *Anandappa v. Totappa* (4) with which we have been especially pressed are, we think, easily distinguishable. We need only mention the first of these cases and point out that the transferor was not the natural guardian of the minor at all but his step-mother. The decision can then be put on the ground that the alienation was not by a guardian strictly speaking so at all, but at the highest by a de facto guardian who was not authorized to deal in any way with the minor's property."

If then Omana could not sue the mortgagee for redemption without getting the sale of equity of redemption by his mother set aside within three years after attaining majority, it follows that the plaintiff as reversioner after the death of Gopikabai would be in no better position. But the decision in *Anandappa v. Totappa* (4) must be considered on this point, because the learned Judges there considered in what circumstances the plaintiff must sue for cancellation of a document which stands in his way of success, and in what circumstances he may disregard the document and sue for the recovery of the property leaving the

defendant to show that the document on which he relies gives him a valid title. At p. 1139 [of 17 Bom. L. R.] the learned Judges say:

"Whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends, we think, upon whether the onus of proving circumstances establishing its validity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity. For example where a plaintiff sues to recover possession of property which the defendant has obtained under a document executed by the plaintiff or one under whom he claims, the plaintiff would have to establish facts entitling him to have the instrument cancelled or set aside and would have to sue within three years of those facts becoming known to him as provided by Art. 91, Limitation Act. On the other hand, where the defendant has acquired possession under a deed executed not by the real owner of the property but by some one having a power of disposal under certain circumstances on behalf of the real owner, the onus lies on the defendant to prove the existence of those circumstances, and the plaintiff may ignore the deed in bringing his suit for possession."

And later on the judgment proceeds:

"It is argued however that the existence of Art. 44, Limitation Act, implies that wherever a guardian has effected a sale of his ward's property, the sale is valid until it is set aside by suit. We are not prepared to hold that the existence of this article involves any qualification of the principles expressed in the judgment of Woodroffe, J., already referred to. The article possibly refers to cases in which a ward might sue to set aside a sale effected by his guardian with the authority of the Court, which would prima facie be valid but which, on proof of certain circumstances such as misrepresentation or fraud with regard to the guardian, might be set aside."

Beaman, J., in *Laxmava v. Rachappa* (1), although he says that *Anandappa v. Totappa* (4) is easily distinguishable, did not explain how he came to that conclusion. In the case before him the property in dispute belonged originally to one Mudkappa who was born in 1891. Whilst he was a minor his mother sold the property to Huchappa, husband of Laxmava, defendant 3, on 31st May 1909. After Mudkappa attained majority, he sold the property to Rachappa, the plaintiff, on 25th September 1912 and it was Rachappa, who had bought from the minor who instituted a suit against the defendants in 1913.

But it was not considered in the judgment whether a minor or his vendee could sue for the recovery of the property without setting aside the conveyance by the minor's mother. The Court

(2) A. I. R. 1915 Bom. 150=33 I. C. 444.

(3) [1854-57] 6 M. L. A. 393=1 Sar. 552=18 W. R. 81n=2 Suth. 29 (P. C.).

(4) A. I. R. 1915 Bom. 132=33 I. C. 441.

seems to have assumed that the plaintiff could not recover the property without setting aside the deed. It is unfortunate that the Chief Justice in *Balappa Dundappa v. Chanbasappa Shivalingappa* (2) does not refer to the case of *Anandappa v. Totappa* (4), which was mentioned by the appellant's pleader during the argument. But I must say there is considerable force in the contention by Mr. Manerikar in this case that the passage in the judgment at p. 1139 in *Anandappa v. Totappa* (4) applies to this case. The argument is that the minor could disregard entirely his mother's disposition. The equity of redemption had come down to him from his father. Therefore he was entitled to go to the mortgagee and ask to redeem the property. It would be then for the alleged owner of the equity of redemption, who happened to be the mortgagee, to set up a sale deed of the equity of redemption from the minor's mother in order to defeat the claim of the mortgagor to redeem. Therefore the argument proceeds that it would not be a suit under Art. 44 to set aside a transfer made by the minor's mother of the equity of redemption, as it would lie upon the defendant to prove that document in order to defeat the plaintiff's claim.

As this is a question which must be finally decided sooner or later, considering the state of authorities, it seems to me to be advisable that the appeal should be heard before a Bench of three Judges. If I referred a question to a Full Bench, my decision based on their answer to the question would still be appealable under the Letters Patent.

Macleod, C. J.—This appeal has now been fully argued, and an opportunity has arisen for deciding a question which has given rise to a considerable conflict of judicial opinion, namely, whether a Hindu minor, on his attaining majority, can sue to recover possession of property transferred by his mother acting as his natural guardian during his minority without suing to set aside the transfer and therefore coming within the provisions of Art. 44, Lim. Act. That question was answered in the negative by Beaman and Heaton, JJ., in *Laxmava v. Rachappa* (1), where the plaintiff had bought certain property from one Mudkappa which had been sold by Mud-

kappa's mother during his minority to the defendant, and reference may be made to *Mahableshwar Krishnappa v. Ramchandra Mangesh* (5), where K as manager of the family appointed a muktyar who sold mulgeni rights. K's eldest son after attaining majority sued to recover possession, alleging that the sale was void. It was held that it could not be treated as a nullity and the right of the plaintiff to challenge it was barred by Art. 44, Act 9 of 1908. But there are contrary decisions of this Court.

In *Bhagvant Govind v. Kondi* (6), the plaintiff sued to redeem land alleged to have been mortgaged by his father in 1858 to the grandfather of defendant 1. The defendant alleged that the mortgage had been executed in favour of the father of defendant 2 and that in 1863 the equity of redemption had been sold to the mortgagee by the mortgagor during the plaintiff's minority. The defendant contended that the suit was really one to set aside the sale of 1863 and was barred by Art. 44, Lim. Act 15 of 1877. It was held that Art. 44 did not apply as the necessity for impugning the sale of 1863 to defendant 2 arose from defendant 2 resisting the plaintiff's claim to redeem the mortgage, and was therefore subservient to the suit for possession. It was also held that defendant 2, having entered into possession as mortgagee, could not afterwards set up an adverse possession as owner so as to defeat plaintiff's right to redeem: *Ali Muhammad v. Lalta Bakhsh* (7) and *Tanji v. Nagamma* (8).

In *Anandappa v. Totappa* (4) plaintiff sued for a declaration that a deed of exchange dated 15th June 1900 was not binding on him and for recovery of possession of certain lands. The deed of exchange purported to be between the plaintiff, a minor interested in his own right as the adopted son of a vatandar acting through his natural father, and the natural grandfather of the plaintiff. The District Judge reversing the decision of the Subordinate Judge held that it was not necessary for the plaintiff to sue to set aside the deed on the authority of the decision of the Privy Council in

(5) A. I. R. 1914 Bom. 300=35 Bom. 94=21 I. O. 350.

(6) [1890] 11 Bom. 279.

(7) [1875-78] 1 All. 655.

(8) [1866-67] 3 M. H. O. R. 137.

Bijoy Gopal Mukerji v. Krishna Mahishi Debi (9). But that was a suit by a reversioner to recover possession of property leased by a Hindu widow. The decision of the District Judge was upheld in appeal by Scott, C. J., and Rao, J. They said:

"Whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends, we think, upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity."

They then referred to the decision of Woodroffe, J., in *Harihar Gajra v. Dasarathi Misra* (10). That again was a suit by a reversioner to recover property alienated by a Hindu widow. Woodroffe J., relied on a passage in the judgment of the Madras High Court in *Unni v. Kunchi Amma* (11).

That was a suit filed on behalf of a Malabar Tarwad by two of its members to recover property improperly alienated under a kanom instrument by the karnavan.

It was held that since a prayer for the cancellation of the kanom instrument was not an essential part of the plaintiff's relief, the suit was not barred by the three years' rule in Art. 91, Act 15 of 1877.

The Court said:

"In our opinion there is no distinction between this case and other cases where a similar charge is made in respect of an instrument of alienation executed by a person who not being the full owner of the property, has a conditional authority only to dispose of it. Such are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a divided Hindu family. In these cases, as was argued by the appellants' vakil it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up because as between the parties to it it may be a perfectly valid instrument. All that is needed is a declaration that the plaintiffs' interest is not affected by the instrument, and that declaration is merely ancillary to the relief which may be granted by delivery of possession."

Reference was made to *Sikher Chund v. Dulputty Singh* (12), where Prinsep, J., said:

"The fact that a guardian may have improperly sold property belonging to his ward, and may have embodied this transaction in a written

instrument, cannot in my opinion affect the position of a minor seeking to recover that property merely because a written instrument was executed. That instrument is between the guardian and a third party. If the guardian has exceeded his authority, the instrument is not the act of the minor, and it would not be incumbent on him to sue to set it aside, as in the case of one who has himself executed an instrument the validity of which he impugns."

But it must be noted that there was no article in the Limitation Act of 1871 which was then in force corresponding with Art. 44 of the present Act.

In *Anandappa v. Totappa* (4) it was argued that the existence of Art. 44, Lim. Act, implied that whenever a guardian has effected a sale of his ward's property the sale was valid until it was set aside by suit. But Scott, C. J., said:

"We are not prepared to hold that the existence of this article involves any qualification of the principles expressed in the judgment of Woodroffe, J., already referred to. The article possibly refers to cases in which a ward might sue to set aside a sale effected by his guardian with the authority of the Court which would prima facie be valid, but which on proof of certain circumstances, such as misrepresentation or fraud with regard to the guardian, might be set aside."

In *Balappa Dundappa v. Chanbasappa Shivalingappa* (2) the plaintiff sued to redeem a mortgage executed by his father, his step-mother during his minority having sold the equity of redemption to the defendant mortgagee. As plaintiff brought the suit more than three years after attaining majority, it was argued the suit was barred by Art. 44.

Scott, C. J. said:

"It appears to us extremely doubtful if Art. 44, Limitation Act, has any application in circumstances such as we have here. The step-mother cannot be in a better position than any other manager to deal with immovable property which is not her own, as appears from the case of *Hunoomanprasad Panday v. Mt. Babooee Munraji Koonwerree* (3) which was a case of a mortgage by a mother. The learned Judge appears to think that the question with regard to Art. 44 is disposed of by the judgment of the Privy Council in *Malkarjun v. Narhari* (13) in which a reference is made to *Bhagwant Govind v. Kondi* (6). It appears to us that that conclusion is not correct, because the question of the powers of the so-called de facto guardian in relation to a defence of limitation under Art. 44 was considered after exhaustive argument by the Privy Council in *Mata Din v. Ahmad Ali* (14), and the conclusion arrived at is that Art. 44 has no application to the case of a de

(9) [1907] 34 Cal. 329=11 O. W. N. 424=5 C. L. J. 334=9 Bom. L. R. 602=2 M. L. T. 133=17 M. L. J. 154=4 A. L. J. 329=34 I. A. 87 (P. C.).

(10) [1906] 33 Cal. 257=9 C. W. N. 636=1 C. L. J. 408.

(11) [1891] 14 Mad. 26.

(12) [1880] 5 Cal. 302=5 C. L. R. 374.

(13) [1901] 25 Bom. 337=2 Bom. L. R. 927=5 C. W. N. 10=27 I. A. 216=10 M. L. J. 268=7 Sar. 739 (P. C.).

(14) [1912] 34 All. 213=39 I. A. 49=15 O. C. 49=13 I. C. 976 (P. C.).

facto guardian wholly unauthorized to effect a transfer."

In *Mata Din v. Ahmad Ali* (14) a Mahomedan sued to redeem a mortgage, the equity of redemption of which had been sold by his elder brother, treating the sale as a nullity. The defendant pleaded that Art. 44, Limitation Act, applied but their Lordships of the Privy Council said:

"Article 44 prescribes a period of three years within which a ward, who has attained majority, may set aside a sale made by his guardian, the time running from the date of the ward's majority. This provision has no application to the present case, for the sale here was effected, not by a guardian, but by a wholly unauthorized person."

But their Lordships did not say that an unauthorised alienation was beyond the scope of Art. 44, and herein, with all due respect, lies the fallacy of the argument of the learned Chief Justice, the foundation of which was laid in the judgment in *Unni v. Kunchi Amma* (11), where all alienations, whether by managers of a joint family, Hindu widows or guardians, were placed in the same category. As remarked by Mr. Rustomjee in his Commentary on the Limitation Act, at p. 250:

"Article 44 presupposes that the alienation is unauthorized, and if it were held that such alienation does not come within the article, the article would in effect be nullified."

In order to answer the question before us we must confine ourselves strictly to the case of a transfer of property by a Hindu mother acting as natural guardian of her minor son, and not be led away by false analogies. The position of the natural guardian is not the same as that of the Hindu widow, or the manager of a joint family, or an unauthorized guardian. The doctrine of subservienoy which was applied in *Bhagvant Govind v. Kondi* (6), was expressly disapproved of by the Privy Council in *Malakarjun v. Narhari* (13). In that case a mortgagor sought to redeem after the equity of redemption had been sold at a judicial sale in execution of a decree. Their Lordships held that the sale was not a nullity and that the suit was to set aside the sale. They said at p. 350:

"It is obvious that the expression 'set aside a sale' is not attended by any such difficulty (as the expression 'set aside an adoption'), because a sale, valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside."

Referring to *Bhagvant Govind v.*

Kondi (6), which had been relied upon in argument, their Lordships said:

"In overruling the plea of limitation the Court made the following observations: 'The necessity of impugning the sale of 1863 to defendant 2 arises from defendant 2's resisting the plaintiff's suit to redeem the mortgage and is therefore subservient to that suit'. Their Lordships find it impossible to grasp the reasoning behind them. If it means that the right to set aside the sale is kept alive as long as the right to redeem would subsist by virtue of the mortgage, the result is that the validity of the sale might be held in suspense for sixty years. . . . But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law. . . . The Limitation Act protects bona fide purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such however seems to be the effect of the doctrine of subservience laid down by the Bombay High Court."

The argument that if the plaintiff sues for possession, ignoring the transfer, he cannot be said to be suing to set aside a transfer, for the question does not arise until the defence is raised, is also disposed of by this judgment, while reference may be made to *Shrinivas v. Hanmant* (15) where it was held that Art. 118, Act 15 of 1877, applied to every suit where the validity of defendant's adoption is the substantial question in dispute, whether such question is raised by the plaintiff in the first instance or arises in consequence of the defendant setting up his own adoption as a bar to the plaintiff's success.

Lastly, there is the argument that a plaintiff need not sue to set aside a transfer to which he is not a party: *Sikher Chund v. Dulputty Singh* (12). That argument may very well apply to a suit by a reversioner impugning a transfer by a Hindu widow, for the widow represents her husband's estate, and until her death there is no one who has a vested interest, nor is there an obligation on anyone to take proceedings until the reversion falls in. But the natural guardian represents the minor's estate and has power to manage it, subject to the condition that he must manage it for the benefit of the minor.

There was one argument addressed to us, which seems to me to have considerable weight, and which I should have

been inclined to favour if it had not appeared that it has been concluded by authority.

The use of the word "ward" in Art. 44, Lim. Act, is peculiar and there seems no reason why the word "minor" should not have been used. It was argued that "ward" in Art. 44 means a minor to whom a guardian has been appointed by the Court under the Guardians and Wards Act or by will. "Ward" is defined in the Guardians and Wards Act as a minor who has a guardian, but the only guardians referred to in the Act are guardians appointed by the Court or by will, and there is nothing unreasonable in the suggestion that the term "ward" is confined to a minor who has such a guardian and does not include minors who have natural guardians. That appears to have been the view underlying the remarks of Scott, C. J., already referred to in *Anandappa v. Totappa* (4). But on reference to the judgment of the Privy Council in *Malkarjun v. Narhari* (13) at p. 351 and *Mata Din v. Ahmad Ali* (14) it will be seen that their Lordships expressly state that Art. 44 applies to transfers by guardians without excluding natural guardians, and as in the one case they were referring to a Hindu mother, and in the other to guardians under Mahomedan law, it is obvious that they considered that natural guardians under Hindu or Mahomedan law were not excluded.

It follows that in my opinion Omana could not redeem without suing to set aside the transfer by his mother and as he did not do so within three years of his attaining majority, the plaintiff's suit is barred.

The appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Heaton, J.—I concur.

Shah, J.—I agree that the present suit is barred by limitation; and as this conclusion involves a reconsideration of the ratio decidendi in *Balappa Dundappa v. Chanbasappa Shivalingappa* (2), to which I was a party, I desire to state briefly my reasons for accepting it.

In the present case the property belonged to Nana, who mortgaged it to the defendant's father in 1877. Nana died, leaving a widow, Sidubai, and a minor son, Omana. Sidubai, purporting to act as the guardian of Omana, sold the equity of re-

demption to the defendant's father in 1891. Omana died in 1901, leaving a widow Gopika who died in 1908. The plaintiff who is the next heir of Omana after the death of his widow Gopika, filed the present suit in 1916 to redeem the mortgage of 1877. The defendant relied upon the sale by the mother of Omana. But it has been found by the lower appellate Court that there was no necessity nor was there any benefit to the estate.

It is urged however on behalf of the defendant that the sale was liable to be set aside at the instance of Omana on his attaining majority and that his right to file a suit for that purpose having been barred by Art. 44, Lim. Act, before his death in 1901, the plaintiff's present claim for redemption, which necessarily involved the setting aside of the sale by Omana's mother, was barred. It is urged that he cannot ignore the sale, which is not void but voidable at the instance of the minor son, and that a prayer to set aside the sale is essentially involved in the claim for redemption.

The questions that arise for decision are whether Art. 44 applies to a sale by the natural guardian of a Hindu minor, and, secondly, whether it is necessary to have it set aside before making any claim for possession or redemption on the footing that no such sale exists.

As regards the first point, I am satisfied that the scope of Art. 44 is not limited to sales by guardians who are appointed under testaments or by the Court. The language of the article is general and wide enough to include sales by natural guardians, who may have some authority, however limited, to alienate the property of the minor, that is, sales which are not wholly void, but are voidable at the instance of the person interested in the property. This view derives support from the observations of their Lordships of the Privy Council in *Malkarjun v. Narhari* (13) and *Mata Din v. Ahmad Ali* (14). Though the article was first introduced in the Limitation Act of 1877, there is no case in which it is held to be restricted to sales by testamentary guardians or guardians appointed by the Court. The mother of a Hindu minor as the natural guardian of her son has authority to alienate the immovable property of her son under necessity or for the benefit of the estate. It is enough to refer to *Hunoomanper-*

saud Panday v. Mt. Babooee Munraj Koonweree (3) on this point. It cannot be said that the sale here was wholly unauthorized as in *Mata Din's* case (14). I am, therefore of opinion that the sale, such as we have in this case, was one which the minor on attaining majority could have sued to set aside and Art. 44 would have applied to such a suit.

The next question in effect is whether he ought to have sued to set it aside, and if so, what is the effect of his omission to do so within the prescribed period on the present suit. On this point also I am of opinion that he ought to have sued to set it aside within the period allowed by Art. 44 and his omission to do so bars the present suit filed by a person who claims under him. It seems to me that the observations of their Lordships in *Malkarjun's* case (13) and in *Khiarajamal v. Daim* (16) support this view. The sale by the mother in this case was not null and void, but it was voidable at the instance of Omana.

I have reached this conclusion after a consideration of the conflicting authorities on this point, and I am satisfied that the reasoning in *Balappa Dundappa v. Chanbasappa Shivalingappa* (2) cannot be properly applied to the case of a sale by the natural guardian of a Hindu minor, who has power to sell the property of the minor under certain circumstances.

Section 38, T. P. Act, to which a reference is made in the judgment in *Balappa's* case (2), applies to a sale by any person authorized only under circumstances in their nature variable to dispose of immovable property. As for instance, it may apply to a Hindu widow who has inherited her husband's estate but has a limited power of disposal over the immovable property, as well as to a Hindu widow as the natural guardian of her minor son, who can alienate the immovable property of her son under certain circumstances. But it only lays down a substantive rule as to when such transfers would bind the persons affected by them. It is not the purpose of the section to lay down the remedies which persons affected by the transfers may have to adopt to get rid of the effect of the transfers made by different persons

with limited powers of disposal. A reversioner affected by the transfer effected by a Hindu widow who has inherited her husband's property may be able to adopt a particular course. A minor whose property has been alienated by his natural guardian may have to adopt a different course. A reversioner may sue during the lifetime of the widow to have her alienation declared inoperative after her death or may wait until her death. The alienation by her is in no case void: it is good during the widow's lifetime: and after her death it does not require to be set aside under any article. The reversioner's interest during the widow's lifetime is contingent and not vested in the estate and his suit for possession after the widow's death is governed by Art. 141. The case of a Hindu minor affected by the transfer effected by his mother appears to be quite different. The sale can be set aside on his attaining majority and there is a special article which provides the limitation for such a suit. I do not think therefore that S. 38, T. P. Act, can afford any reason for treating all cases to which it would apply, on the same basis as to the remedies open to the persons affected by the transfers.

I need not refer to those cases in which the suits were filed by reversioners in respect of the alienations by the widows who had inherited their husband's property.

As regards an alienation by a natural guardian of a Hindu minor, the case of *Bhagvant Govind v. Kondi* (6) is undoubtedly against the view which we take in this case. But so far as the case relates to the point under consideration, it is distinctly disapproved by the Privy Council in *Malkarjun's* case (13).

Though the case of *Balappa Dundappa v. Chanbasappa Shivalingappa* (2) decided by Scott, C. J., and myself may be distinguishable on its special facts as the alienation in that case was by a step-mother, the ratio decidendi in that case and in the case of *Anandappa v. Totappa* (4) supports the conclusion reached in *Bhagvant's* case (6), and these two decisions are based upon the view that the necessity for a plaintiff to sue for setting aside a sale depends upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity.

(16) [1905] 32 Cal. 296 = 32 I. A. 23 = 1. O. L. J. 584 = 8 Sr. 734 = 9 O. W. N. 201 = 2 A. L. J. 71 = 7 Bom. L. R. 1 (P. O.).

This view was largely based upon observations made in cases relating to suits by reversioners in respect of alienations made by widows inheriting their husbands' estates as such. On a further consideration I am satisfied that the necessity for suing to set aside a sale does not depend so much upon the question whether the onus lies upon the plaintiff or the defendant in the first instance, but upon the question whether the sale is by a person wholly unauthorized or by a person who is authorized only under certain circumstances to alienate the property, or in other words whether the sale is null and void or only voidable if the person interested seeks to avoid it. If the latter is the case, the persons concerned should sue to have it set aside if there is any article of the Limitation Act applicable to such a suit. In the present case Art. 44 applies, and therefore the necessity of suing to set aside the sale is established under the circumstances.

In two later cases, *Laxmana v. Rachappa* (1) and *Hemidas v. Virupaxappa*, Second Appeal No. 1143 of 1917, decided on 1st October 1918 (unreported), the decisions in *Balappa Dundappa v. Chanasappa Shivalingappa* (2) and *Anandappa v. Totappa* (4) have been dissented from. I have reconsidered the point in view of this conflict of decisions and in the light of the arguments urged in this case, and I am satisfied that the view we now take is the correct view.

Speaking for myself, I regret the result for, as a matter of fact this view is likely to unsettle some existing titles to immovable properties. The decision in *Bhagvant's case* (6) was in 1889. In 1900 that part of the decision with which we are concerned was disapproved by the Privy Council. In spite of that *Bhagvant's case* (6) has been probably followed on this point in some cases in this Presidency, I mean cases which have not been reported. Then we come to the conflicting decisions to which I have already referred. I cannot say that the course of decisions has been uniform and long enough to invite the application of the doctrine of *stare decisis*.

I therefore concur in the order proposed by my Lord the Chief Justice.

Nur Mahomed Gulam Rasul—Plaintiff
—Appellant.

v.

Surat City Municipality—Defendant
—Respondent.

Second Appeal No. 101 of 1918, Decided on 19th December 1919, from decision of Dist. Judge, Surat, in Appeal No. 29 of 1916.

Bombay District Municipalities Act (3 of 1901), S. 151 (1)—Municipality's decision that lime kiln in particular place is nuisance and its power to stop it cannot be challenged in civil Court—Civil Court is only competent to see whether the power is properly used.

Section 151 (1) gives a Municipality power, if it be shown to their satisfaction that any place used for the purpose of a lime kiln is, or is likely by reason of such use and situation to become, a nuisance to the neighbourhood, or is so used, or situated as to be likely to be dangerous to life, health or property, by written notice to require the owner or occupier at once to discontinue the use of, or at once to desist from carrying out or allowing to be carried out the intention to use any such place for the purpose of a lime kiln. Therefore if there is a lime kiln within the limits of the Municipality, they are the judges as to whether it is, or is likely to become, a nuisance to the neighbourhood, and the Courts will not interfere with the exercise of that power unless it can be shown that they have exercised it in an improper manner. It is only for the purpose of seeing whether the Municipality have exercised their power in the proper way that the Court will consider the evidence to see what steps the Municipality took before they issued the notice. [P 9 C 1]

G. N. Thakor—for Appellant.

S. S. Patkar—for Respondent.

Judgment.—The plaintiff is the owner of a lime-kiln situated on land near the Variavi Gate at Surat. On 11th November 1914 a notice, dated 28th October, was served by the defendant Municipality on the plaintiff under S. 151, Bombay District Municipal Act, 1901, requiring him to stop working the said kiln on the ground that it was likely to cause a nuisance. The plaintiff therefore has brought this suit for a declaration that the order of the defendant Municipality was illegal, wanton, capricious and oppressive, and for a permanent injunction restraining the defendant from interfering with the plaintiff in carrying on his work in the aforesaid kiln, and costs. The trial Court decreed that the plaintiff's kiln was not a nuisance, within the meaning of S. 151 (1), Bombay District Municipal Act, which the Municipality had a right to order to be discontinued.

The District Judge, on appeal, reversed that decree and directed that the plaintiff's suit be dismissed with costs. It is quite obvious from the judgment of the trial Judge that he looked at the case from an entirely wrong point of view. S. 151, Bombay District Municipal Act, 1901, comes under the heading "Nuisances from certain trades and occupations."

One of those trades or occupations is the use of property for the purpose of a lime-kiln. So that we must take it that a lime-kiln in view of the legislature might be a nuisance, and the section gives the Municipality power, if it be shown to their satisfaction that any place used for the purpose of a lime-kiln is, or is likely by reason of such use and situation to become, a nuisance to the neighbourhood, or is so used, or situated as to be likely to be dangerous to life, health or property, by written notice to require the owner or occupier at once to discontinue the use of, or at once to desist from carrying out or allowing to be carried out, the intention to use any such place for the purpose of a lime-kiln. Therefore if there is a lime kiln within the limits of the Municipality, they are the judges as to whether it is, or is likely to become, a nuisance to the neighbourhood, and the Courts will not interfere with the exercise of that power unless it can be shown that they have exercised it in an improper manner. It is only for the purpose of seeing whether the Municipality has exercised its power in the proper way that the Court will consider the evidence to see what steps the municipality took before they issued the notice, and in this case the notice was issued on the strength of a report from the Health Officer, and if the Health Officer reported that this lime-kiln was, or was likely to become a nuisance, how can it possibly be said that the Municipality acting on his report were acting in a manner not recognized by law? I agree entirely with what the learned appellate Judge says on this question. It is not for the Court to deal with the questions whether what is complained of by the Municipality has been or is likely to be a nuisance, and to consider whether as a matter of fact that particular use of land within the municipal limits is a nuisance or is likely to become a nuisance to the neighbour-

hood. Therefore I am in entire agreement with the decision of the learned District Judge and the appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 9

MACLEOD, C. J. AND HEATON, J.

Tayabali Abdullabhai Vohra—Plaintiff—Appellant.

v.

Dohat Municipality—Defendant—Respondent.

Second Appeal No. 1120 of 1918, Decided on 15th January 1920, from decision of First Class Sub-Judge, Ahmedabad, in Appeal No. 336 of 1917.

Bombay District Municipal Act (3 of 1901), S. 122—Verandah on part of public street for over 30 years—Site being acquired by prescription—Notice under S. 122 for removal is incompetent.

Where a verandah has been standing on a part of a public street for over thirty years, the site becomes the property of the person to whom the verandah belongs by the operation of S. 28 and Art. 146-A, Lim. Act. In such a case the Municipality have no power to issue a notice under S. 122, Municipal Act, for removal of the verandah. [P 10 C 1]

G. N. Thakor—for Appellant.

M. N. Mehta—for Respondent.

Macleod, C. J.—This was a suit by the plaintiff for a declaration that the property mentioned in the plaint belonged to him, and for a permanent injunction restraining the defendant Municipality from removing the plaint verandah. The plaintiffs got a decree in the trial Court which was reversed on appeal, the learned appellate Judge being of opinion that the case was governed by the decision in *Dakore Town Municipality v. Anupram* (1). We do not think that the decision of that case applies to the facts of this case, nor do we think that however long a private person may have been in possession of a portion of a public street or road, the Municipality have still powers under S. 122, Bombay District Municipal Act, to direct him to give up possession, or to force him to give up possession, of such part of the public street or road. In this case it has been proved as a fact, and it has been accepted as a fact in both Courts, that the verandah has been on the present site for more than thirty years. Assuming that it was originally built on a part of a public street or road the Municipality

(1) A. I. R. 1914 Bom. 266=98 Bom. 15=21 I. O. 513.

is now barred from bringing a suit for recovering possession by virtue of Art. 146-A, Lim. Act, and the result must follow under S. 23 that the plaintiff has acquired a title to the land on which the verandah is built by over thirty years' possession. It is therefore no longer a part of the public street or road, and the Municipality have no jurisdiction over it because S. 122 only refers to encroachments or obstructions in a public street, or obstructions or encroachments of the like nature in any open space not being private property. Once I find that this verandah is built on land which has ceased to be part of a public street or road, and has become private property, it follows that the Municipality cannot issue a notice against the owner to remove it. The notice in this case, which is dated 22nd December 1915, directs the appellant to remove the encroachment, but it does not mention the section under which the notice is given. I can only assume that it was issued under S. 122. In my opinion the Municipality by their laches had lost all right to the land covered by this verandah and therefore they had no longer any power to issue notice under S. 122 for the removal of the verandah. I think therefore the appeal succeeds and the decree of the trial Court must be restored with costs of the appeal here and in the lower appellate Court.

Heaton, J.—I concur.

G P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 10

MACLEOD, C. J. AND HEATON, J.

Bhimraj Ganpat Pawar—Plaintiff—Appellant.

v.

Laxman Ramchandra Satbhai—Defendant—Respondent.

Second Appeal No. 365 of 1916, Decided on 25th November 1919, from decision of Dist. Judge, Ahmadnagar, in Appeal No. 11 of 1916.

Transfer of Property Act (4 of 1882), S. 53—Suit under O. 21, R. 63, by person claiming under sale—Defendant can be allowed to avoid sale—Civil P. C., O. 21, R. 63.

In a suit by a claimant to attached property for a declaration that the property is his by virtue of a sale and is not liable to attachment, the defendant should be allowed to avoid the sale if he establishes a right to avoid, even though he establishes the right by way of defence in a suit in which he is a defendant.

[P 11 C 1]

P. V. Nijasure—for Appellant

Y. N. Narkari for *K. H. Kelkar*—for Respondent.

Macleod, C. J.—The property in question was attached by the defendant in this suit in execution of a decree against one Bhau Dadaji. Then the plaintiff sought to raise the attachment on the ground that the property belonged to him. The application to raise the attachment was rejected. That order was not final. It remained for the unsuccessful party, if he chose, to take proceedings in a regular suit to have it decided to whom the property belonged. So as the Judge in execution proceedings disallowed the present plaintiff's application it lay upon him, if he wanted the execution proceedings to be stayed, to file a regular suit. The defendant claimed that the property belonged to his judgment-debtor on the ground that the transfers of his judgment-debtor were in fraud of the creditors, and so could be set aside at the instance of anybody defrauded under S. 53, T. P. Act. The Judge considered that defence on the merits and decided in favour of the defendant.

It is now urged in second appeal that that defence could not be taken and that the defendant was bound to file a separate suit to set aside the transfer to the plaintiff before the attachment proceeding could go on. That is a purely technical objection. When there are two claimants to the property which is being attached, namely, the party who seeks the assistance of the Court by execution, and the opposite party who claims that the property belongs to him, there are many ways of proceeding. The Court in execution may decide in favour of one side or the other, in which case the order will not be final, or it may direct one of the parties to file a suit to have the question decided. But however that may be, we have in this suit two opposite parties the party to whom Bhau Dadoji transferred his property and the claimant in execution who set up a case that the transfer to the plaintiff was in fraud of creditors. That issue has been fully dealt with by the learned Judge, and the evidence has been taken, and it has now been decided that those transfers were in fraud of the creditors. There is no reason now in second appeal to accede to the contention of the appellant's pleader that all those transactions were irregu-

lar, and that in this suit it should have been decreed that the defendant be relegated to another suit to have the same question tried over again. The appeal is dismissed with costs.

Heaton, J.—I agree. The defendant has established in this suit that he has a right to avoid the sale under which the plaintiff claims. It is said that though he may have established this right, the Court cannot give effect to it, because the defendant was bound to bring a suit on his own account to have the sale-deed set aside, and that it was only after obtaining a decree in a suit of that kind that this defence can be made effective. I think that in this particular class of cases, whatever may be true of other cases, the law does intend that a defendant in the position of the present defendant should be allowed practically to avoid a sale if he establishes his right to avoid it. And this is so although he has not established his right to avoid it in a suit brought for that particular purpose but only by way of a defence in a suit in which he is a defendant. I therefore think that the appeal should be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 11

PRATT, J.

Jamsedji F. Shroff—Plaintiff.

v.

Husseinbhai Ahmedbhai—Defendant.

Original Civil Suit No. 987 of 1918,
Decided on 11th October 1919.

Civil P. C (5 of 1908), O. 40, R. 4—Court's leave though subsequently obtained cures defect.

Where a suit is filed against a receiver without first obtaining the leave of the Court which appointed him, the defect can be cured by leave subsequently granted. [P 11 C 2]

Kanga—for Plaintiff.

Desai—for Defendant.

Judgment.—The summons was issued on an application by the plaintiff for leave to continue the suit against the defendants who are receivers of the estate of Ahmedbhai Habibbhai. The plaintiff claims to have been employed as a broker by the receivers and sues for his brokerage. It is clear therefore that there is a question to be tried and the case is one in which the Court would grant leave as a matter of course: *Lane v. Capsey* (1)

(1) [1891] 8 Ch. D. 411=61 L. J. Ch. 55=65 L. T. 375=10 W. R. 87.

and *Braja Bhusan Trigunait v. Sris Chandra Tewari* (2).

The only difficulty arises from the fact that per incuriam the suit was filed without the previous sanction of the Court. It was held in *Pramotha Nath Gangooly v. Khetra Nath Banerjee* (3) that leave of the Court is a condition precedent to the right to sue and that that omission cannot be rectified by subsequent application. The judgment in that case is not supported by any reasons and was not followed in *Rustomjee Dhunjibhai Sethna v. Frederic Gaebale* (4). The various statutory provisions which require the consent of the Court or some other authority as a condition on which a suit may be maintained are collected in the case of *Chandulal Khushalji v. Awad* (5). The consideration of those and subsequent authorities shows that the words in the statute have to be examined in each case in order to ascertain whether the provision is a bar to the Court dealing with the action, or is a bar to the original institution of the suit. In the former case the suit may continue on leave subsequently granted: for instance, the leave of the Collector in a suit to which Ss. 4 and 6, Pensions Act 23 of 1871, are applicable: *Nawab Muhammad Azmat Ali Khan v. Mt. Lalli Begam* (6), or leave under O. 1, R. 8 (1), Civil P. C.: *Fernandez v. Rodrigues* (7), or leave under S. 20, Civil P. C.: *Narayan Shankar v. Secy. of State* (8). But in the latter case, that is when the bar is to the original institution of the suit, leave subsequently granted is of no avail: for instance, the consent of the Advocate General under S. 92, Civil P. C. [*Tricumdass Mulji v. Khimji Vullabhdass* (9)] or the leave of the Court under S. 17, Presidency Towns Insolvency Act: *Dwarkadas Tejbandar, In re* (10).

In the case of a suit against a receiver there is no statutory provision requiring the leave of the Court. But the same principle would apply, and the defect can be cured by leave subsequently granted if there is no bar to the institution of the

(2) [1918] 47 I. C. 719=4 P. L. J. 20.

(3) [1905] 32 Cal. 270.

(4) [1919] 46 Cal. 352=51 I. C. 486.

(5) [1897] 21 Bom. 351.

(6) [1882] 8 Cal. 422=9 I. A. 8=4 Sar. 310=17 P. R. 1882 (P. O.).

(7) [1897] 21 Bom. 784.

(8) [1906] 30 Bom. 570=8 Bom. L. R. 543.

(9) [1892] 16 Bom. 626.

(10) A. I. R. 1915 Bom. 131=40 Bom. 235=31 I. C. 948.

suit, that is, to the jurisdiction of the Court to admit the plaint.

The necessity for leave to sue the receiver rests upon two considerations: (1) that such a suit is incompatible with the dignity and authority of the Court; (2) that it might interfere with the duty of the Court to maintain the receiver's possession. Neither of these considerations affects the jurisdiction of the Court. They are matters which the Court can deal with after the suit is filed; and the Court could order the suit to be stayed until it was satisfied that there was no encroachment upon its authority, nor want of attempt to interfere with the receiver's possession.

Therefore it seems clear that leave may be granted after the filing of the suit, and Mr. Desai, with his customary fairness does not dispute this proposition.

Accordingly, I make the summons absolute, but direct that plaintiff pay the costs of the summons. Counsel certified.

G.P./R.K. *Summons made absolute.*

A. I. R. 1920 Bombay 12

SHAH AND CRUMP, JJ.

M. K. Swamirao—Defendant—Appellant.

v.

J. J. Valentine — Plaintiff—Respondent.

Second Appeal No. 832 of 1918, Decided on 12th December 1919, from decision of Dist. Judge, Poona, in Appeal No. 14 of 1917.

Civil P. C. (5 of 1908), Ss. 47 and 144—*Ex parte decree set aside*—Property must be restored back whether under S. 47 or S. 144.

Where in execution of an *ex parte* decree property is recovered from the judgment-debtor the latter is entitled to restoration of the property on the *ex parte* decree being set aside, it being immaterial whether the application for such restoration falls under S. 47 or S. 144. [P 12 C 2]

Y. N. Nadkarni for *S. M. Warde*—for Appellant.

J. G. Rele—for Respondent.

Shah, J.—The plaintiff in this case obtained an *ex parte* decree against the defendant on 27th November 1915. On the 25th March an application for setting aside this decree was made by the defendant. The plaintiff had applied for execution and he executed the decree on 17th April 1916. On 1st July 1916 the *ex parte* decree was set aside upon certain terms as to costs and thereafter the suit was transferred from the Court of the First Class Subordinate Judge of Poona

to the Haveli Court. On 10th August 1916 the defendant applied for the restoration of the property which the plaintiff had recovered in execution of the *ex parte* decree. This application was made to the Court of the First Class Subordinate Judge at Poona. The Joint Subordinate Judge, who disposed of this application, was of opinion that the application ought to have been to the Haveli Court and that his Court had no jurisdiction to entertain the application. The defendant appealed to the District Court, and the learned District Judge held that S. 144, Civil P. C., under which the application was made for restitution had no application to the present case and expressed his opinion that it was open to the defendant to apply to the Haveli Court. In the result he dismissed the appeal.

The defendant has appealed to this Court. It is urged on his behalf that his application is within the scope of S. 144 and that in any event it is open to him to make the application under S. 47, Civil P. C. It is not clear on the terms of S. 144 that such an application would be within the scope of the section. It is quite clear, in my opinion, that the defendant, who applied for restitution, is entitled to have the property restored to him when the decree under which the plaintiff got possession of it has been set aside. If not under S. 144, Civil P. C., under S. 47, he can make the application for getting back the property and, in my opinion, the present application, which purports to have been made under S. 144, could be treated as an application relating to the execution of this decree. It is a matter not of any practical importance whether it falls under S. 144 or S. 47, Civil P. C. The appellant is entitled to the restitution of this property. I also feel clear that the Court, which originally passed the decree had jurisdiction to entertain this application and that the application was properly made to that Court.

I would accordingly set aside the orders of the lower Courts and send back this application to the Court of first instance to be disposed of according to law.

As the suit is said to be still pending in the Haveli Court it may be convenient to have this application disposed of by that Court. If so advised it will be

open to either party to get this application transferred to that Court by a proper application to the District Court.

Costs up to date to be costs in the application.

Crump, J.—I concur.

G.P./R.K.

Case remanded.

A. I R. 1920 Bombay 13

MACLEOD, C. J. AND HEATON, J.

Bhaiji Ishvardas Shah—Plaintiff—Appellant.

v.

Talukdari Settlement Officer — Defendant—Respondent.

Second Appeal No. 83 of 1917, Decided on 5th January 1920, from decision of Dist. Judge, Ahmedabad, in Appeal No 362 of 1914.

(a) Gujarat Talukdars' Act (6 of 1888), Ss. 31 and 33—Position of a cadet of Talukdar's family receiving Jivai is of a talukdar—Jivaidar alone can deal with Jivai—Talukdari tenure is not subject to ordinary law of inheritance or succession.

A cadet of a talukdar's family to whom a grant is made in Jivai is a cosharer and in the same position as a talukdar. Therefore the only person entitled to deal with Jivai property is the Jivaidar for the time being.

Land held in talukdari tenure is totally distinct from land ordinarily held as joint family property by a Hindu family. It is not subject to the ordinary law of inheritance or succession. [P 13 C 2]

(b) Bombay Land Revenue Code (5 of 1879), S. 79-A—Scope of—Possession whether unauthorised or wrongful is to be looked to with reference to date of notice and not prior to it.

Section 79-A refers to any person unauthorisedly occupying, or wrongfully in possession of any land and therefore it does not matter whether a person is in unauthorized occupation of land before the date when the section became applicable. The question is whether at the date of the notice he is unauthorisedly occupying, or wrongfully in possession of the land. [P 14 C 1]

H. V. Divatia—for Appellant.

Coyajee and S. S. Patkar—for Respondent.

Macleod, C. J.—The plaintiff sued for a declaration that the defendant the Talukdari Settlement Officer of the Gujarat Prant, had no right to take from him possession of the field described in the plaint, and for a permanent injunction restraining the defendant from taking possession or causing it to be taken from him or from obstructing the plaintiff in any way. The property mentioned in the plaint is part of the Talukdari estate which had been settled in Jivai on a cadet branch of the Talukdari family. One Vakha in 1892 was the elder member

of that cadet branch. He mortgaged the plaint property to the plaintiff, and his son Vaza joined in the mortgage. Vakha died in 1904. In 1905 Vaza executed a sale deed to the plaintiff of the property mortgaged in 1892. In 1908, the Talukdari Settlement Officer issued a notice directing him to give up possession. The learned District Judge has confirmed the decree of the lower Court which dismissed the suit.

In appeal the first point that was taken was that Vakha and Vaza were not Talukdars within the meaning of S. 31, (1) Gujarat Talukdars' Act, 6 of 1888. That question, we think has been decided by the decision of this Court in *Thakarshi Trikam v. Chudasama Akhubha* (1) and we agree with the learned District Judge in thinking that that case cannot be distinguished from this case. The parties there were Bhayats, and so are they in this case. The only distinction that can be drawn between the two cases is that in *Thakarshi Trikam's case* (1), the whole village had been granted in Jivai, whereas in this case only a few fields. The fact remains that a grant was made in Jivai to cadets of the Talukdar's family, and they therefore must be considered as cosharers and in the same position as Talukdars.

Then, it was argued that as Vaza was joint with his father, he had an interest in the Jivai property as if it were joint family property. We cannot agree with that argument. The land held in Talukdari tenure is totally distinct from land ordinarily held as joint family property by a Hindu family. It is not subject to the ordinary law of inheritance or succession and we have only to refer to Part 3 of the Gujarat Talukdars' Act to see that partition of Talukdari land is governed by particular laws. It is only a person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a Talukdari estate, and every cosharer whose name has been recorded, as such, in the Settlement register prepared in accordance with S. 5, who can be entitled to have his share divided from the rest of the estate. Then the subsequent sections enact how partitions should be effected. Therefore I cannot think that in 1892 Vaza was a cosharer with his

(1) S. A. No. 438 of 1910, decided on 5th May 1911.

father in the Jivai property, and not having any interest in the property at the time, he was not competent to encumber the interest to which he might succeed on his father's death. Therefore all that was mortgaged by the document of 1892 was the life-interest of Vakha, since Vakha was not competent owing to the provisions of S. 31, (1) Act 6 of 1888, to enter into a valid mortgage beyond his lifetime. Then, it would follow that Vaza became entitled to the Jivai land on the death of his father, and there is no necessity to consider whether there was any equity between him and the mortgagee owing to his having been a party to the mortgage of 1892. But in 1905 he sold the property to the plaintiff. That clearly was an invalid alienation under S. 31 (2), Gujarat Talukdars' Act. The Talukdari Settlement Officer therefore was entitled to issue notice under S. 79-A, Bombay Land Revenue Code, read with S. 33 (2), Gujarat Talukdars' Act.

It has been argued that, because Vaza became interested in the Jivai property before S. 79-A, Land Revenue Code, became applicable to alienations by Talukdars, therefore notice cannot be given under that section. But S. 79-A, Bombay Land Revenue Code refers to any person unauthorizedly occupying, or wrongfully in possession of, any land, and it does not matter whether a person is in an unauthorized occupation of land before the date when the section became applicable. The question is whether, at the date of the notice, he is unauthorizedly occupying, or wrongfully in possession of the land and that we find was the case with the plaintiff in this case. Therefore the Talukdari Settlement Officer was entitled to serve him with notice, and this suit, in which the plaintiff asked for a declaration that the Talukdari Settlement Officer has no right to take from him possession of the plaintiff property, fails and this appeal must be dismissed with costs.

Heaton, J.—I agree. It is quite plain that the plaintiff-appellant has acquired no valid title in virtue of the alienation by Vaza in 1905, nor indeed has it been contended that he did acquire any good title by virtue of that alienation. The appellant's case before us rests on a mortgage of 1892. This was a mortgage by Vakha, the father of Vaza, and

also by the latter. If the latter had an existing interest in the property, which is Jivai property, in 1892, no doubt he could have encumbered that existing interest. The mortgage itself was drafted as if it were an ordinary joint family property in which a father and his son were interested and were effecting the mortgage. But the property which was mortgaged was not ordinary joint family property. It was Jivai property, and, as was held by this Court in *Thakarshi Trikam v. Chudasama Akhubha* (1), the Jivaidar is a cosharer in the Talukdari estate and as such a Talukdar. The Jivaidar in 1892 was Vakha. Having regard to the nature of Talukdari property, to the nature of the grants by Talukdars which come under the name of Jivai, and having regard to the provisions of the Gujarat Talukdars' Act, it seems to me that we must hold, as did the District Judge, that the only person entitled to deal with this Jivai property was the Jivaidar at the moment, and that was Vakha and not Vaza. This conclusion is fortified by the provisions of the Gujarat Talukdars' Act relating to partition.

Vaza in 1892 was not a person who, according to the provisions of S. 10 of that Act, had any right to have any interest or share partitioned on the ground that it was his. Holding therefore that Vaza at that time had no existing interest which he could part with, the fact that he joined in the execution of the mortgage deed of that year makes no difference whatever to the interest which the mortgagee acquired. He only acquired such interest as the Jivaidar Vakha could mortgage to him. That mortgage ceased to have any effect from the date of Vakha's death in 1901. Thereafter, the possession of this property was possession contrary to the provisions of the Gujarat Talukdars' Act, and in particular contrary to the provisions of S. 31 of that Act; and therefore the Talukdari Settlement Officer was empowered to issue a notice under S. 79-A, Bombay Land Revenue Code, which, in the year 1905 by Bombay Act 2 of that year, was made specifically applicable to the use or occupation of land in contravention of any of the provisions of the Gujarat Talukdars' Act. In my opinion, there is no doubt that the appeal was rightly decided by the Court of first appeal, and

that we must dismiss the appeal before us.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 15 (1)

MACLEOD, C. J. AND HEATON, J.

Govindlal Maneklal—Defendant—Appellant.

v.

Ichha Vagha and others—Plaintiffs—Respondents.

Second Appeal No. 689 of 1918, Decided on 20th November 1919, from decision of Asst. Judge, Ahmedabad, in Appeal No. 529 of 1916.

Civil P. C. (5 of 1908), O. 39, R. 1—Actual injury or prospect of doing irremediable injury must be shown to obtain injunction.

In a suit for an injunction the plaintiff must show that the opposite party has done something towards infringing his rights, or that he is on the point of doing something which will infringe these rights, and that there is the prospect of irremediable injury being suffered by the plaintiff unless he takes proceedings to stop the defendant's action. [P 15 C 2]

G. N. Thakor—for Appellant.

B. G. Rao for G. S. Rao—for Respondents.

Macleod, C. J.—The plaintiffs sued to obtain a perpetual injunction restraining the defendant from taking possession of 5 gunthas of land on which traces of their houses were situated towards the northern and southern sides of the field described in the plaint. It appears that the plaintiffs leased to the defendant portion of a certain survey number on the 22nd October 1905. They referred to a certain field out of which 37 gunthas were leased to the defendant, reserving as the lease says, two gunthas to the plaintiffs. Out of that one guntha was towards the north and one guntha was towards the south. The plaintiffs might reside on that land. It appears that the plaintiffs had obtained leave to build before the date of the lease on two gunthas, but after the lease was given to the defendant, it was found that they had built not on two gunthas only, but on five gunthas altogether, and in 1912 the Collector ordered them to remove the buildings on the additional three gunthas. But it has been found as a fact in both Courts that the plaintiffs have been ever since the date of the lease in possession of those five gunthas, although the defendant may have complained that he was entitled to three out of those five gunthas and the plaintiffs under the terms of the

lease were only entitled to retain two gunthas for their buildings and the plaint distinctly states that all that the plaintiffs complained of against the defendant was that he wanted to take possession of those three gunthas so as to make up the 37 gunthas mentioned in the lease. The plaintiffs do not state in the plaint that the defendant had taken any actual steps towards interfering with the plaintiffs' possession. Therefore it is quite clear that the suit is framed as a 'quia timet' action, and none of the conditions which must exist before a 'quia timet' action can be said to lie exists in this case. The opposite party must do something towards intruding the plaintiffs' rights, or it must be so clear that he is on the point of doing something which will infringe the plaintiffs' rights, so that consequently there must be the prospect of irremediable injury being suffered by the plaintiffs unless they take proceedings to stop the defendant's action. Here there is no evidence whatever that the defendant has taken any steps towards obstructing the plaintiffs from building on these three gunthas; or that he has entered on the land, or that he has done anything more except complaining that he has not got the whole of the land which was leased to him in 1905. So that there was no cause of action on which the suit could be founded. That point does not seem to have been taken in either of the lower Courts. Evidently the Courts looked upon the defence as really being in itself a counterclaim for specific performance of the lease or for a reduction of the rent. The order of the lower appellate Court must be set aside and the suit dismissed. As there is no ground on which the Court could grant the injunction which was granted by the decree, and as this point was not really taken until it was taken by the Court, there will be no order as to costs.

Heaton, J.—I concur.

G.P./R.K.

Order set aside.

* A. I. R. 1920 Bombay 15 (2)

SHAH AND HAYWARD, JJ.

Waman Balvant Kashikar and others—Plaintiffs—Appellants.

v.

Harshet Shete and others—Defendants—Respondents.

Second Appeal No. 818 of 1917, Decided on 14th October 1919.

* Civil P. C. (5 of 1908), S. 9—Right to worship any deity without interference to others is civil right—Right of religious procession in public streets when not interfering with others' right is also civil inherent right.

The ordinary right of a citizen to worship, according to his own belief, any deity and in such manner as his belief requires him to do so long as he does not prevent others from carrying on similar worship according to their own belief, is a right of a civil nature and any interference with that right is a matter in respect of which relief would in a proper case, be granted by a civil Court. [P 17 C 1]

The right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. The right to carry on the worship of any deity in any manner that a person pleases, subject to similar conditions, is also a right inherent in every person. [P 17 C 2]

K. H. Kelkar —for Appellants.

Jaiyakar and S. S. Patkar— for Respondents.

Shah, J.—The question in this second appeal is, whether the plaintiffs' claim is cognizable by civil Courts.

The plaintiffs allege that their ancestors set up a new Bahiri temple at Chiplun for worship and devotional sports many years ago, that the present defendants' ancestors, who worshipped the same deity installed as the old Bahiri, filed Suit No. 28 of 1844 in the Court of the Munsif of Chiplun against the worshippers of the newly installed deity, and that in that suit they in effect sought to restrain the then defendants (plaintiffs' predecessors) from carrying on the worship of the new Bahiri in the same manner as the worship of the old Bahiri. A decree was passed in the suit and ultimately upheld by the Sudder Diwani Adawlut in Special Appeal No. 4631 in the year 1852, under which the then defendants were restrained from performing certain ceremonies as being appurtenant to the village deity, but were allowed to perform them on their passing an agreement to the Collector that they would not perform the particular ceremonies as village ceremonies but would perform them for sports and out of devotion. They further allege that in 1911 the District Magistrate passed an order under S. 44, Bombay District Police Act, at the instance of the present defendants res-

tricting the plaintiffs in their worship to the four rites mentioned in the said decree and referred to in the prayer clause as items Nos. 1, 9, 11 and 13. They allege that they have been subsequently prohibited by an order made in October 1911 to use a dhol on the said occasions. They claim in this suit a declaration that they have a right to do certain acts of worship in connection with the new Bahiri and for an injunction restraining the defendants from obstructing them in the performance of the worship in that manner. They also claim damages to the extent of Rs. 5. The acts referred to in the plaint in the prayer clause are these:

"1. Palkhi procession in the month of Falgun.

2. Performance of tamasha on the sahan before the god and tamasha procession along with the palkhi in the town.

3. Moving about in the town playing dhulwad (playing with mud, etc.,) and along with nishans and zendes (banners) on the first day of the latter half of Falgun.

4. Moving about in town playing shenwad (playing with cowdung) along with nishans and zendes (banners) on the 2nd day of the latter half of Falgun.

5. Procession of rang (colours) through the town and the throwing of colours on each others body on 5th day of the latter half of Falgun.

6. Taking of the palkhi to Chetavali in Chaitra.

7. Pal kiraka procession on Jeshta and Ashad and on occasions a kiraka procession of and killing of a goat.

8. To do jagar in Shrawan and on the full-moon day in Shrawan taking of a cocoanut in procession from the temple to the Eunder (harbour) for offering to the water-deity.

9. Tying povtis (cotton thread) round the wrist of the god in Shrawan.

10. Taking of the palkhi in procession to Uktad in Bhadrapad.

11. Setting up (ghat) in the temple in Ashwin.

12. Making out palkhi on Dasra day for the worship of Shami tree.

13. Waiving lamp about the idol in Diwali.

14. Raising of the banner and the god going to hunting on the full moon day in Paush and the lowering of the banner and the return of the god on the full moon day in Magh.

15. And other acts required to be done occasionally, and to use the dhol on those occasions."

The defendants contend that the claim is not cognizable by the civil Courts and that on merits the plaintiffs have no such rights. The plaintiffs gave a purshis to the effect that the right of performing the ceremonies mentioned in the plaint was not vested in the deity, but it was their right to perform the said

ceremonies before the deity for sports and out of devotion.

Both the lower Courts have disallowed the plaintiffs' claim on the preliminary ground that the suit is not cognizable by the civil Courts.

In the appeal before us we are not concerned with the merits of the plaintiffs' claim, nor with the extent and form of the relief, which the plaintiffs may be ultimately found to be entitled to. The only question that we have to consider is whether the claim is cognizable by the civil Courts.

It will be convenient to state the terms of the decree in the suit of 1844 and of the order of the District Magistrate. In the suit of 1844 the Court had made the following order:

"By doing ceremonies of manasthiti, such as taking out palkhis, preparing pottis, etc, at the new temple in course of time it will not be possible to distinguish ceremonies of manasthiti from the other and plaintiff will thereby suffer. Therefore the ceremonies of manasthiti performed at the new temple i.e., 1. Taking out palkhi in Shimga, 2 Preparing pottis in Shrawan, 3 Setting up ghat in Ashwin and 4. Waiving lamp in diwali should not be performed by the defendants. But if the defendants pass a Muchalka (recognizance) or Karar to Government that they will perform them not as village ceremonies (ganvkihi manasthiti) but will perform them for sport and out of devotion (khaladakh bhakti), there is no reason to forbid them to do so. They should follow their own devotion. Performing ceremonies of manasthiti at the new temple is not approved by Government. If defendants don't pass a karar they should not perform the ceremonies specified in the plaint.

The stone set up as idol by defendants is installed according to rites as stated by defendants' witnesses. There is therefore no reason to remove them. They will be treated like the several ones which some people set up out of devotion."

The District Magistrate passed a considered order under S. 44, Bombay District Police Act (Bom. Act 4 of 1890), in which he directed in p. 16 (2) that:

"The new Bahiri people should perform only the four ceremonies mentioned in p. 13 above after passing the karar to Government that they would perform them for sport and out of devotion and not as of manasthiti; they shall not perform at all the other ceremonies referred to in para. 14 above neither out of sport nor out of devotion nor as of manasthiti and shall not be allowed to pass any karar concerning those other ceremonies."

The ceremonies referred to in paras. 13 and 14 of the order are the ceremonies which are now referred to in the plaint.

The question is whether the present claim of the plaintiffs is of a civil nature. There is no question in this suit as to

the right to property or to an office and the explanation to S. 9 of the Code has no application. It is not suggested in this case that the cognisance of this suit is either expressly or impliedly barred. In fact S. 44, Bombay District Police Act, expressly provides that any order made by the District Magistrate under sub-S. 1 shall be subject to a decree, injunction or order made by a Court having jurisdiction. The question therefore simply is whether the suit as framed is of a civil nature within the meaning of S. 9 of the Code. Almost all the prayers in the plaint relate to some processions to be carried in the town of Chiplun on some occasions accompanied with some ceremonies in connexion with the new Bahiri. The plaintiffs claim the right to worship the deity in any manner they please and to use the public streets for the purpose of processions connected with the worship of the deity as detailed in the plaint and to use the dhol on these occasions, and they make it clear that they do not claim to carry on any worship in connexion with the new Bahiri as if it was the worship of the village deity (Gram Devata). The order of the District Magistrate makes it clear that they are prohibited altogether from performing any of these ceremonies except the four which are mentioned in the decree in the suit of 1844, even for sport or out of devotion. The pleadings in the present case and the terms of the order of the District Magistrate make it quite clear that the real dispute between the parties is as to whether the plaintiffs are entitled to carry on the worship of the new Bahiri as they please so long as they do not perform it as of manasthiti, or whether the defendants have the exclusive right to perform those ceremonies with reference to the village deity and to prevent other persons from performing similar worship in connexion with another deity of the same name.

The prayers in the suit also involve the claim to use the public streets for the purpose of certain religious processions as detailed in the plaint. The question in this case is, not whether the defendants shall be required to perform any ceremony or that the plaintiffs shall be required to do so, but whether the ordinary right of a citizen to worship, according to his own belief, any deity and in such manner as his belief requires

him to do, so long as he does not prevent others from carrying on similar worship according to their own belief, is a right of a civil nature. After giving the best consideration to this point it seems to me that in substance the plaintiff's suit is of a civil nature, and if they have a right to worship the new deity in any manner they please, any interference with that right is a matter with reference to which they can get relief in a civil Court provided they are found entitled to that relief.

It has been held in several cases that the right to conduct religious processions in the public streets is a right inherent in every person provided he does not thereby invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. Further the right to carry on the worship of any deity in any manner that a person pleases subject to similar conditions is also a right inherent in every person, and it is an important right. I do not think that the lower Courts are right in holding that the suit is not of a civil nature. In the present case the question does not relate to any religious rites or ceremonies, but to the right of the plaintiffs to be protected in the performance of the worship of their deity in any manner they please, subject to the conditions which I have already stated with reference to the right to use the public streets, and to their right to prevent the defendants from interfering with the performance of the worship in their own way.

This conclusion in the present case appears to me to be consistent with the view which the Sudder Diwani Adawlut took in the suit of 1844 which came up to that Court. It was held by the learned Judges then that the suit was cognizable by a civil Court under Regn. 2 of 1827, S. 21, as it then stood, having regard to the nature of that suit and the relief claimed by the plaintiffs in that suit. The present suit seems to me to be of a similar nature. The present plaintiffs seek to be protected in the performance of their worship of the deity. I do not express any opinion as to the effect of

the decree in that suit on the merits of the present claim. The District Magistrate has referred to this decree in his order, and it is a point in dispute between the parties as to whether the effect of the decree is in favour of the plaintiffs or the defendants in the present case. That is a matter which the Court dealing with the suit on the merits will have to consider and to decide. I refer to that suit at present only for the purpose of showing that it was held to be of a civil nature.

Several cases have been cited in the argument at the Bar; but I do not consider it necessary to discuss them. The nature of the present suit must be determined with reference to the allegations and the pleadings in the present case. The observations in the reported cases which have been relied upon on either side must be read with reference to and in the light of the nature of the particular suit in which they are made. I do not think that any decision referred to in the argument conflicts in any way with the view which I take of this case.

I would therefore allow this appeal, set aside the decrees of the lower Courts and remand the suit to the trial Court for disposal according to law.

All costs to be costs in the suit.

Hayward, J. —I agree. The cause of action is, in my opinion of a civil nature, in so far as it relates to the conduct of the defendants tending to prevent the exercise of the ordinary rights of freedom of worship of the other side, whether in private or in public. It would seem, broadly speaking, that every citizen has a right to worship as he pleases so long as he does not thereby trench upon the rights of office or property of other persons. He has, broadly speaking, similarly a right to go in procession so long as he does not interfere with the rights of others to the unrestricted use of the public roads and streets. But the exercise of these rights is always subject to such orders as might be necessary to prevent disorder or riot by the Magistrates under S. 44, Bombay District Police Act or S. 144, Criminal P. C.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 19

SHAH AND CRUMP, JJ.

Mina Winsor—Opponent—Appellant.

v.

E. Winsor—Applicant—Respondent.

First Appeal No. 57 of 1919, Decided on 3rd December 1919, from decision of Dist Judge, Poona, in Misc. Appln. No. 87 of 1918.

Succession Act (10 of 1865), Ss. 239 and 264 (b)—District Judge is incompetent to give direction after grant of letters of administration.

A District Judge has no jurisdiction to give directions with reference to the property of an estate after granting letters of administration.

[P 19 C 2]

S. Y. Abhyankar—for Appellant.*H. V. Divatia*—for Respondent.

Shah, J.—In this case on the application of Miss E. Winsor for letters of administration of the estate of her deceased father, the District Judge granted the letters of administration to her on 6th September 1918. There were other sisters of the applicant, who either did not appear or did not oppose the application. It is not clear from the record as to what exactly happened on 1st October 1918; but an order was made, apparently with the consent of the sister, who is the appellant before us, and of the pleader who appeared for the original applicant directing that all the houses in question should be advertised and auctioned, the exact arrangement being settled between the parties. On 14th October a further application was put in on behalf of the original applicant asking for certain modification of the order of 1st October. After hearing the parties the learned District Judge made an order on 3rd December 1918, directing that the family house should be valued by the Nazir of the District Court, that the opponent (the present appellant) be paid her one-eighth share in accordance with his valuation, and that the other houses should be sold by private arrangement and not by auction.

The opponent in the Court below has appealed to this Court; and the principal question that arises in the appeal, apart from the merits of these two orders, is whether the District Court had any jurisdiction to make the orders which it made after granting the letters of administration on 6th September. The letters of administration have been granted under the Succession Act, and the case is gov-

erned by the provisions of the Act. We have not been referred to any provision of the Succession Act under which these orders, after the letters of administration are granted and after an administrator is duly constituted, could be justified. Apparently the District Judge had no power to give such directions as he has given in this case on the first occasion with the consent of the parties and on the second occasion after hearing the parties according to his own view of the matter. It appears from the provisions of Act 5 of 1902, S. 5, sub-S. 2, that the High Court may give directions to any private executor or administrator other than the Administrator-General acting officially. This provision has been recently repealed and transferred to the Succession Act as S. 264-B by Act 18 of 1919. I refer to this provision only for the purpose of showing that the power of giving directions to an executor or an administrator is conferred upon the High Court. There is no corresponding power given to the District Court. It appears from the provisions of S. 239, Succession Act, that the District Court has power to make orders with reference to the property under certain circumstances, so long as no person has been appointed administrator of the estate or granted probate of a will. But it is obvious that the section has no application after an administrator is constituted. We are unable to refer the orders made by the District Judge after the grant of the letters of administration to any provision of the Indian Succession Act. The result is that both these orders, one made on 1st October and the other made on 3rd December, must be discharged and the parties must be left in the position in which they were when the letters of administration were granted to the present respondent on 6th September 1918.

This will be without prejudice to any remedy which the persons interested in the estate may have for securing relief by way of such directions to the administratrix as they may desire under the circumstances.

The costs of this appeal and costs in the lower Court subsequent to the order of 6th September to come out of the estate.

G.P./R.K.

Order set aside.

A. I. R. 1920 Bombay 20

MACLEOD, C. J. AND HEATON, J.
Kalu Deoba—Plaintiff—Appellant.
 v.

Rupchand Kishandas — Defendant—Respondent.

Second Appeal No. 942 of 1918, Decided on 6th January 1920, from decision of Asst. Judge, Khandesh, in Appeal No. 2 of 1917.

Limitation Act (9 of 1908), Arts. 134 and 148 — Sale by mortgagee believing to be owner and subsequent repurchase by him does not affect redemption suit by mortgagor in point of limitation.

Certain mortgaged property was sold by the mortgagee to a stranger under the mistaken belief that he was the owner of the property. Ten years afterwards, the property was re-purchased by the mortgagee. In a suit for redemption of the property by the mortgagor:

Held: that the defendant must be deemed to be in possession of the property not as the representative of the purchaser but as mortgagee and that the suit was not therefore barred by time. [P 20 C 2]

K. H. Kelkar—for Appellant.

G. S. Rao—for Respondent.

Judgment.—This suit was originally filed in 1910 by the plaintiffs who sued for redemption of a mortgage dated 10th April 1885. The suit was dismissed in the trial Court. On appeal the case was remanded, and again on appeal from the order of remand it was held by the High Court that plaintiff 1, Shivba, had no right to redeem, and the suit would have to be dismissed as his interest in the equity of redemption had been sold. As regards the other plaintiff who presented Devba, the other mortgagor, the Court decided that he should be allowed an opportunity of redeeming the outstanding mortgage. The case therefore went back to the Subordinate Judge who directed that the plaintiffs should recover from the defendant possession of the properties in suit with the exception of Survey Nos. 54 and 87 of Bharadi and Survey No. 11 of Sarve free from the mortgage. This decree was upheld on appeal except that it was modified by substituting the words "plaintiff 2" for the "plaintiffs". Plaintiff 2, Kalu Devba, has now appealed against that part of the decision of the Assistant Judge which decided that he should not be entitled to recover Survey Nos. 54 and 87 of Bharadi and Survey No. 11 of Sarve.

With regard to Survey No. 11, that is now in the possession of an outsider; having been sold at a Court sale, all that

plaintiff 2 would be entitled to would be compensation from that mortgagee on the ground that when redemption was sought the mortgagee could not produce the property mortgaged. Both the lower Courts have come to the conclusion that compensation should not be allowed, and we agree with the reasons given in the judgment of the learned Assistant Judge.

But with regard to Survey Nos. 54 and 87, they stand on an entirely different footing as they are in the possession of defendant 1 as representative of the original mortgagee. The original mortgagee purchased, as he thought, the equity of redemption of both the mortgagors at a Court sale. Then he sold the property to two outsiders, and after the period of six and ten years, respectively, bought back those properties from the persons to whom he had sold them. He now resists the plaintiffs' claim to redeem on the ground that he is in possession, not as mortgagee, but as purchaser, and the plaintiff's claim to redeem is barred under Art. 134, Limitation Act, if he could show that the suit to redeem has been brought more than 12 years after the original transfer. But the fallacy in that argument lies in this, that the defendant was responsible for the original mistake. He ought to have seen that he had only bought the equity of redemption of one of the mortgagors, and he cannot derive any benefit from his negligence by purporting to sell the whole of the property to third parties, and then purporting to obtain a good title by repurchasing those properties from those parties. In my opinion the original mistake is revived by the properties coming back into the possession of the defendant, and he must be treated now as a mortgagee and not as an innocent transferee without notice. Therefore I think the original decree must be modified by directing that plaintiff 2 should recover from the defendant possession of the properties in suit with the exception of Survey No. 11 of Sarve free from the mortgage. With regard to the successful appellant he pays his own costs up to 13th November 1916 when the Subordinate Judge gave the judgment and he will get his costs in the Court and in the first Appeal Court from the defendants.

G.P./R.K.

Decree modified.

A. I. R. 1920 Bombay 21

MACLEOD, C. J. AND HEATON, J.

Ahmedabad Municipality—Defendant—Appellant.

v.

Gujarat Ginning and Manufacturing Co. Ltd.—Plaintiff—Respondent.

Second Appeal No. 527 of 1917, Decided on 26th November 1919, from decision of Dist. Judge, Ahmedabad, in Appeal No. 329 of 1916.

Bombay District Municipalities Act (3 of 1901), S. 59 (b) (6)—Special sanitary cess in respect of private latrines when can be levied stated.

Where a Municipality provides a sewer for receiving sewage, and an owner of private latrines connects them with the sewer and then the Municipality provides the water, although it may be at an additional cost to the owner, for carrying the sewage from the latrines to the sewer, the latrines are cleansed by Municipal agency and the Municipality are entitled to levy a special sanitary cess in respect thereof. [P 25 C 1]

N. K. Mehta—for Appellant.

B. J. Desai and *G. N. Thakore* — for Respondent.

Facts appear from the following judgments of Heaton and Shah, JJ., dated 11th February 1919, remitting an issue to the lower Court:

Shah, J.—The plaintiff in this case sued the Ahmedabad Municipality to recover the amount of a special sanitary cess paid under protest to the Municipality for the years 1910-11 to 1913-14 on the ground that the cess was illegal.

The Municipality contended that it was legal as it was duly sanctioned by the Governor-in-Council and levied in accordance with the provisions of Bombay District Municipal Act, 3 of 1901.

Both the lower Courts have allowed the plaintiff's claim on the ground that the levy of the cess is not legal; and in the appeal before us the same question has been raised and the correctness of the conclusion of the lower Courts is questioned on behalf of the Municipality.

Before dealing with the points arising in this appeal, it will be convenient to state a few facts, about which there is no dispute. The plaintiff, a limited company owns mill premises with latrines thereon for the use of the mill hands. These latrines have been connected with the Municipal sewer on the road near the plaintiffs' premises. The Municipal sewer with which the latrines are connected, forms part of the general drainage system maintained by the Municipality. The

sewage of the latrines is received into the Municipal sewers and carried away through the Municipal sewers. The latrines are cleansed not by manual labour but apparently by drainage system. The special sanitary cess is leviable by the Municipality under S. 59, Bombay District Municipal Act, provided the conditions as to the levy of the cess as laid down in the chapter relating to Municipal taxation are satisfied. The cess in question was levied in accordance with the rules and bye-laws framed by the Municipality and sanctioned by the Governor-in-Council. The rules and bye-laws then in force have been subsequently modified, but we are not concerned with these new rules. The cess has been levied on the footing that the latrines on the mill premises are cleansed by the operation of the drainage system.

The case for the plaintiff is that the company is not liable to pay the special sanitary cess as the costs of connecting the privies with the Municipal sewers have been defrayed by the company. It is further contended here that the latrines are not "cleansed by Municipal agency," as the plaintiff pays for the water required for flushing the latrines and for the men employed to keep the latrines clear. The Municipality in effect contend that under S. 59, Cl. (vi), read with proviso (b) (i), they have made provision for conducting or receiving the sewage of the latrines into Municipal sewers and that when they have done that the latrines are cleansed by Municipal agency within the meaning of Cl. (vi), and that they are entitled to levy the cess.

The contention that the latrines are not "cleansed by Municipal agency" as contemplated by Cl. (vi), S. 59, is based upon facts which were neither alleged nor proved in the trial Court. It is really a new point. The argument is that if the plaintiff makes arrangements for flushing the latrines, and employs men to keep them clean, they are not "cleansed by Municipal agency." Assuming the facts alleged by the plaintiff in the argument before us in his favour, on reading Cl. (vi) and the proviso (b) (i), S. 59, it is clear that where the Municipality make provision for the cleansing of latrines by manual labour or by conducting or receiving the sewage thereof into their sewers, where the drainage system is in opera-

tion, the latrines are cleansed by Municipal agency within the meaning of Cl. (vi). The fact that the owner of the latrines has to make some arrangements to pass on the sewage from the latrines into the connecting sewers and then into the Municipal sewers makes no difference.

Thus the important question is whether the Municipality have made provision for conducting or receiving the sewage of the latrines into their sewers. The lower appellate Court has held that under the proviso it is not enough for the Municipality merely to construct sewers in the neighbourhood of the premises and to permit the owner to discharge his sewage into the Municipal sewers, but they must construct a branch system of drainage of some sort so that the conducting or receiving of the private drainage may be effected at the cost of the Municipality, though a very little work would be sufficient. It has further held that in the present case the plaintiff has done the whole work.

At this stage I do not desire to express any opinion on the question whether by providing a general system of drainage and by putting up Municipal sewers near the premises of the plaintiff, the Municipality can be said to have made provision for receiving the sewage of the latrines into the Municipal sewers. That is a question which must be considered, if necessary, after the finding on the question of fact is received.

Assuming, without admitting, that the learned District Judge is right in his view that the "provision" referred to in Cl. (b) (i) in the proviso means some arrangement connecting the private latrine with the Municipal sewers, and not the laying out of Municipal sewers as a part of the drainage system generally, the question is whether the Municipality have made such provision in this case. The lower appellate Court has found that the plaintiff has done the whole work. As a finding of fact it would be binding upon this Court in second appeal. It seems to me however that it is vitiated on two grounds. In the first place, it is largely influenced by the consideration as to who has paid the costs of the connexion. The provision in S. 59 makes no reference to the costs of making provision for conducting or receiving sewage of the latrines into the Municipal sewers. The fact as to who has paid the costs is re-

levant ; but I do not think that it is by any means conclusive. It is necessary to know, for instance, as to who has done the work of connecting the latrines with the Municipal sewers and whether the Municipality have done or have to do anything to maintain the connexion. There has been no investigation from this point of view. Secondly, the parties have given no evidence in this case except that certain correspondence between the Municipality and the Local Government through the Commissioner, N. D. has been put in. This correspondence, so far as it is intended to prove the opinion of the Local Government as to the legality of this cess, is not relevant and it affords no proper proof of the facts which it may be necessary to know in order to determine whether the Municipality have made provision for conducting or receiving the sewage into Municipal sewers. The question that arises in this case is one of general importance and some difficulty and it is hardly satisfactory to have a finding without any clear proof of facts, which may have a bearing upon this question. I am not satisfied that the finding as recorded is based upon any legal evidence.

As I have already said, it would be relevant to know as to whether the Municipality have done any work in effecting the connexion between the plaintiffs' latrines and their own sewers, and if so, what ? It is also relevant to know whether after the connexion is effected, the connecting sewers or any parts thereof are maintained by the Municipality, and a plan showing the relative position of the latrines, connecting sewers and Municipal sewers may be useful in enabling the Court to have a general idea of the arrangement for conducting or receiving the sewage of the latrines into the Municipal sewers. I have referred to these points as merely indicating the lines on which evidence might have been adduced. It is for the parties to adduce all relevant evidence in order to enable the Court to decide the point, and I think they may be given a further opportunity of adducing such evidence. It is quite possible that the parties may agree as to the facts relevant to the main position ; if so, a clear and categorical statement of facts agreed to by both the parties should be put in. The Court will consider not only the

question as to who defrayed the cost of effecting the connexion but also as to how far any active assistance of the Municipality was essential, and as to how far it was rendered in effecting the connexion between the latrines and the Municipal sewers. It will be open to the lower appellate Court to consider such other facts as it may think relevant to the issue.

It is not suggested before us that the Municipality have not received the sewage of the latrines into their sewers and maintained the drainage system as a means of carrying the sewage during the years in question.

I would therefore send down the following issue to the lower appellate Court for a fresh finding:

Whether, apart from supplying sewers as part of the drainage system and apart from maintaining that system as a means of cleansing the private latrines the Municipality in fact has made any provision for conducting or receiving the sewage of the plaintiff's latrines into the Municipal sewers during the years in question?

The parties to be at liberty to adduce fresh evidence. Finding to be returned in three months.

Heaton, J.—I agree to the sending down of the issue and with the observations of my learned brother. What has to be determined is whether the Municipality "has made provision for conducting or receiving the sewage" from the plaintiff's premises "into Municipal sewers." That is a question of fact and it is a question which cannot be answered until the Court which determines it knows what the actual arrangements are. It is necessary to know the nature of the general drainage system: and in particular to know exactly how the plaintiffs' latrines are drained into the Municipal sewers. I could not myself answer the question until either I actually saw the material things or had before me plans and sketches or at least an intelligibly full description.

I think the District Judge is wrong as a matter of law, in assuming what he did assume, in the absence of knowledge of the kind I have indicated. He made a large generalization when the law requires the ascertainment of definite and particular facts and then and not till then, the determination of the question

whether the facts show that the Municipality have made the provision required.

Macleod, C. J.—The plaintiff Company, which carries on business in Ahmedabad, sued to recover from the Committee of Management appointed by Government for the Ahmedabad Municipality Rs. 4,709.9-0, which was the amount that they had paid to the defendants as a special sanitary cess directed to be paid by the defendants, which it was alleged the defendants had no right whatever to levy. The facts for the purpose of the case are as follows. The Municipality have provided a main sewer along the road on which the plaintiff's premises abut. The plaintiffs have on their premises private latrines for their operatives, and previous to the period in question in this suit, they cleansed those latrines by manual labour. Then it appeared to them that it would be more convenient if they connected their latrines with the Municipal sewer and they were allowed to do so. The plaintiffs were thereafter called upon to pay a special sanitary cess which the defendants claimed to be entitled to levy under S. 59 (b) (vi) of the Bombay District Municipalities Act. That entitles the Municipality to levy

"a special sanitary cess upon private latrines, premises or compounds cleansed by Municipal agency, after notice given as hereinafter required."

Then there is a proviso (b):

"no special sanitary cess shall be leviable in respect of any private latrines, premises or compounds unless and until the Municipality have (i) made provision for the cleansing thereof by manual labour, or for conducting or receiving the sewage thereof into Municipal sewers, and (ii) issued either severally to the persons to be charged, or generally to the inhabitants of the district or part of the district to be charged, with such cess, one month's notice of the intention of the Municipality to perform such cleansing and to levy such cess."

Apparently no objection was taken at the time to the levying of the special sanitary cess. The trial Court held that the plaintiff Company were not legally liable for the tax, for they had at their own expense connected their flushing privies with the Municipal main drainage gutter, while the Municipality did not by manual labour remove the night soil from the plaintiffs' privies nor had it made arrangements for receiving and conducting the sewage into Municipal sewers. The learned Judge, therefore, allowed the plaintiffs' claim on

the ground apparently that if the Municipality did not make the connexion between the main sewer and the private latrines, they could not charge the special sanitary cess.

In first appeal the same view was taken by the District Judge. He said :

"the grounds on which a special sanitary cess can be levied are stated in S. 59, and the ground there given is not the use of the Municipal sewer or in sharing in the benefits of the sewage farm or pumping system, but the making provision by the Municipality for conducting or receiving the sewage into Municipal sewers. What then entitles the Municipality to demand a special sanitary cess is not the construction of sewers in the neighbourhood of the premises, nor the permission to the property owner to discharge his sewage into the Municipal sewers, but the construction of a branch system of drainage of some sort so that the conducting or receiving of the private drainage may be effected at the cost of the Municipality. I imagine that a very little work would have been sufficient."

So that the learned District Judge's view was this. There is a main sewer. It is not sufficient if the Municipality provide the sewer. They must incur some of the expenses and do some of the work necessary for connecting the latrines to the sewer. If they pay for a very little, a foot or two of pipe-line, so as to connect the plaintiffs' latrines with the main sewer, that would be sufficient in his opinion to entitle the Municipality to levy the cess. But as the whole of the expenses of connexion were paid by the plaintiffs, he dismissed the appeal.

In second appeal the real point at issue was taken, namely, that one must look first to (b) (vi), S. 59, in order to determine when the Municipality can in the first instance levy the special sanitary cess. It was argued that (b) (vi) shows that it cannot be levied upon private latrines or premises or compounds unless they are cleansed by Municipal agency; and then even if they are cleansed by Municipal agency, still the cess cannot be levied unless the Municipality has made provision for the cleansing of private latrines or premises by manual labour, or for conducting or receiving the sewage thereof into the Municipal sewers. It was further argued that the plaintiffs' latrines are not cleansed by Municipal agency, that the Municipal water laid on to the latrines is paid for by the plaintiffs, and that therefore it is the plaintiffs who cleanse the latrines and not the Municipality. Therefore there is no necessity to look to

the proviso as the conditions which bring the proviso into operation do not exist. I see that my brother Shah, before whom this second appeal was originally argued with my brother Heaton, said at p. 2 of the printed-book:

"Assuming the facts alleged by the plaintiff in the argument before us in his favour, on reading Cl. (vi) and the proviso (b) (i), S. 59, it is clear that where the Municipality make provision for the cleansing of latrines by manual labour, or for conducting or receiving the sewage thereof into their sewers where the drainage system is in operation, the latrines are cleansed by Municipal agency within the meaning of Cl. (vi). The fact that the owner of the latrines has to make some arrangements to pass on the sewage from the latrines into the connecting sewers and then into the Municipal sewers makes no difference."

But the case was remanded for the trial of an issue whether, apart from supplying sewers as part of the drainage system, and apart from maintaining that system, as a means of cleansing the private latrines, the Municipality in fact had made any provision for conducting or receiving the sewage of the plaintiffs' latrines into the Municipal sewers during the years in question. That issue is found by the District Judge in the negative. The learned District Judge has found that none of the work of the connexion between the sewer and the plaintiffs' latrines was done by the Municipality, not even the branch connexion, which is sometimes constructed by the Municipality. When that is done, the owner has to pay a tax of 8 annas a year. In the remand judgment Shah, J., says :

"At this stage I do not desire to express any opinion on the question whether by providing a general system of drainage and by putting up Municipal sewers near the premises of the plaintiff the Municipality can be said to have made provision for receiving the sewage of the latrines into the Municipal sewers. That is a question, which must be considered, if necessary, after the finding on the question of fact is received."

It seems to me that although the owner of private premises with private latrines may pay the whole of the expense of the connexion between his premises and the manhole, still it can be said that the Municipality have made provision for the receiving of sewage from his private latrines by having laid down the sewer, with the manholes at intervals, with which connexions are made with private premises. It seems to me that the making of the connexion consisting of a few feet of pipe line from the manhole to the limit of the owner's premises is a very

minor matter and if the Municipality provide the sewer and the manhole, then they have done what is required of them by the proviso (b) (i). It follows then that they are entitled to charge a special sanitary cess, provided it can be said that these private latrines on the plaintiffs' premises are cleansed by Municipal agency. If the sewer was not in position, as it is, then the private latrines could not be cleansed except by manual labour. It is true that by another tax the plaintiff pays for the Municipal water which carries the sewage along the connecting pipe down to the sewer, but it cannot be said that these private latrines are cleansed, not by Municipal agency, but by the agency of the owner. I think it was clearly the intention of the Act that if the Municipality provide a sewer for receiving the sewage and the owner of private latrines connects them with the sewer and then the Municipality provides the water, although it may be at an additional cost to the owner, for carrying the sewage from the latrines to the sewer, the latrines are being cleansed by Municipal agency and the Municipality are entitled to levy a special sanitary cess. In my opinion, therefore these appeals should be allowed and the plaintiffs' suits dismissed with costs throughout. The cross objections are disallowed with costs.

Heaton, J.—I need not restate the facts and arguments which appear fully in the judgments of this Court in the case which was remanded and in the judgment of my Lord the Chief Justice which has just been delivered. When the Bench first heard the case, and I was a member of that Bench, we found that we could not arrive at any satisfactory decision because the facts were far too vague. The facts have now been made definite. The question is whether the plaintiff is or is not liable for a special sanitary cess. His liability depends upon the fulfilment of two conditions. First of all, the private latrines must be cleansed by Municipal agency. Taking the facts which are either admitted, or stated in the remand judgment of the District Judge, I hold that these latrines are cleansed by Municipal agency. They are cleansed by the combined operation of the Municipal water system and the Municipal drainage system. That is what actually happens in practice. They are flushed with water

which comes from the municipal system, and that water carries away what is required to be carried away through the drainage pipes into the main sewer. The Municipal water system is organised and maintained by Municipal agency. The general drainage system is organised and maintained by Municipal agency also, and, therefore I think that it can with certainty be said that, as things now stand, these latrines are cleansed by Municipal agency and not by private agency.

The second condition is that the Municipality shall have made provision for conducting or for receiving the sewage into the Municipal sewers from the private latrines. They certainly have not made provision for conducting the sewage. The whole of that has been done by the private owners, the plaintiffs. But I hold that the Municipality have made provision for receiving the sewage. They have done it in this way. They have first of all provided a general sewage system. That, of course, is essential. Without that there can be no provision for receiving the sewage. But it does not follow that because there is a general system, that, therefore there is provision for receiving the sewage from any particular private premises. What has happened appears on the facts stated by the District Judge. You cannot receive the sewage at every point into the main sewer. You have to make special provision for receiving it at the point at which you wish to receive it, and that is done in Ahmedabad by providing a manhole and the necessary facilities for connecting the subsidiary pipes with the main sewer. The manhole has been provided in such a way that the plaintiffs were able to connect the subsidiary sewer or drain, which they had made, directly with the main sewer. Seeing that the Municipality not only provided the general system including the main sewer, but also the manhole and the facilities which made it possible for the plaintiffs to connect up his subsidiary system with the main system, I think that they had made provision for receiving the sewage. I therefore agree that the appeal should be allowed and that the claim should be dismissed with costs throughout.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 26

MACLEOD, C. J. AND HEATON, J.

Kallangowda Nangangowda Patil —
Plaintiff—Appellant.

v.

Bibishaya Shah Mahomed Khan—De-
fendant—Respondent.First Appeal No. 108 of 1918, Decided
on 7th January 1920, from decision of
Asst. Judge, Dharwar, in Suit No. 30 of
1917.Limitation Act (9 of 1908), Arts. 123 and
144—Suit by Mahomedan heir for his share
is governed by Art. 144—Time begins to run
when he is excluded from joint possession or
his title is denied.Where on the death of a Muhammadan his
heirs continue to hold the estate as tenants-in-
common, a suit by one of them for partition of
his share is governed by Art. 144 and time begins
to run against the plaintiff from the moment
when the other co-heirs of the deceased do some
act the effect of which is either to exclude the
plaintiff from the joint property or to deny his
right to share. [P 26 C 2]*Nilkant Atmaram*—for Appellant.*R. A. Jahagirdar*—for Respondent.

Macleod, C. J.—Defendant 1's hus-
band and defendant 3 were entitled to
succeed to their father's property accord-
ing to Mahomedan law. The defendant 3
mortgaged his share, or the property,
representing his share, to the plaintiffs,
and eventually sold the equity of redem-
ption to them. The plaintiffs therefore
are entitled to the share in the estate to
which defendant 3 was entitled. They
are endeavouring now to get possession
of that share by partition. They are
being resisted by the second defendant
who is a tenant of defendant 1. The
lower Court dismissed the suit on the
ground that it was barred by limitation.
The learned Judge seems to have thought
that Art. 123 applied, with this startling
result. Supposing the heirs of a deceased
Muhammadan chose to live in community
as is certainly often done in Bombay,
and even more often up-country, for sever-
al generations, the rights of each of the
sharers to a partition would be barred
twelve years after the death of the origi-
nal head of the family. We do not think
that that can be the case. We do not
think that Art. 123 can apply to the
facts of this case where two Muham-
madans continue to own as tenants-in-
common an estate of their deceased fa-
ther. The ordinary law would apply
that time would begin to run against one
tenant-in-common when the other tenant-

in-common did some act the effect of
which was either to exclude his co-te-
nant from the joint property, or to deny
his right to share. It may then be said
that time begins to run from the date of
such exclusion or denial, and the article
which would be applicable would be 144.
It was admitted that, even if time began
to run in 1905, the suit, which was origi-
nally filed on 15th October 1915, will be
in time. I think therefore that the de-
cree of the lower Court must be set aside
and a preliminary decree for partition
should be passed. The plaintiffs will be
entitled to the costs of the appeal.

Heaton, J.—It is contended that this
suit falls under Art. 123 of the Schedule
to the Lim. Act. If it does, then no
doubt the suit is time barred. If it does
not, then it is not shown that the suit is
time-barred, and there is every reason
to suppose that it is not. In my opinion
Art. 123 does not apply. The present
suit is certainly not in terms a suit for a
distributive share of the property of an
intestate. It is in terms a suit to have
partitioned property which two persons
are holding in common and to have the
partition made so that each of these two
persons shall be allotted his proper share.
The suit is not based on the circumstance
of anybody's intestacy, or of rights im-
mediately arising out of an intestacy, so
I think that in substance also the suit
does not come under Art. 123. We have
here the very common case of Muham-
madans who succeed to the property of
a deceased relative, and by agreement
amongst themselves instead of distribut-
ing that property by shares, hold it in
common. They are entitled under our
law to do this. They are not under an
obligation to at once divide the property
according to their shares. They can hold,
and continue to hold it, in common, and
having done so they hold it under an
agreement. They can continue to do so
for an indefinite period, but when they
wish they can put an end to this common
holding, and ask that there shall be par-
tition. The ground for asking for a par-
tition in such a case is not that described
in Art. 123, but it is that one of the par-
ties to the agreement by which hitherto
they have held the property in common
desires to put an end to that agreement
and have the property partitioned. When
he desires to do that, he has a right to
come to the Court to get the Court to do

it for him. I think therefore the decision that this suit was barred by time was wrong and a preliminary decree for partition should be made as proposed.

G.P./R.K.

Decree set aside.

A. I. R. 1920 Bombay 27

SHAH AND CRUMP, JJ.

Dnyanu Pandu Chavan — Plaintiff—Appellant.

v.

Tanu Balaram Chavan—Defendant—Respondent.

Second Appeal No. 502 of 1918, Decided on 25th November 1919, from decision of First Class Sub-Judge, Satara, in Appeal No. 321 of 1916.

Hindu Law—Adoption — Junior daughter-in-law can adopt with consent of father-in-law.

In the case of an undivided family an adoption made by a junior widowed daughter-in-law with the consent of her father-in-law is valid.

[P 27 C 2]

Patwardhan and M. V. Bhat—for Appellant.

Jayakar and K. Y. Abhyankar—for Respondent.

Shah, J.—The question of law argued in this second appeal is whether the adoption of Babu (defendant 11) by Tanu (defendant 2) is valid, according to Hindu law.

The facts relating to this point are briefly these: One Balaram Gujar had three illegitimate sons, Pandu, Raoji and Krishna. We are not concerned with Raoji at all. Krishna left a son named Dnyanu. He is found to have been adopted by Pandu in 1907. Pandu had a son Bala, who died in 1903 leaving two widows named Banu and Tanu. It appears from the recitals in the document of authority passed by Pandu that Tanu had an infant son who died some time before 1910. Bala died in union with his father. The infant son does not appear to have attained the age of ceremonial competence. In 1910 Pandu authorized Tanu to make an adoption. She adopted Babu in 1911. Pandu died in 1913. Dnyanu, the adopted son of Pandu filed the present suit claiming the property of Pandu to the exclusion of defendant 11.

The question as to the validity of the adoption of defendant 11 was decided by the trial Court in favour of the plaintiff on the ground that Babu, who was a legitimate son of his natural father,

could not be validly adopted as Pandu was an illegitimate son of his father and as there would be 'no inter-marriage and interdining between legitimately born Mahrathas and bastard Mahrathas'. In appeal the First Class Subordinate Judge with appellate powers did not accept the ground taken up by the trial Court, and held the adoption to be valid.

In the appeal before us it is contended that the adoption is invalid as Banu, the senior widow of Bala, had the preferential right to adopt, and that the consent given by the father-in-law to Tanu, the junior widow, was neither sufficient nor valid under the circumstance. In support of the adoption it is urged that the exception in favour of the power of the widowed daughter-in-law to adopt with the consent of her father-in-law is recognized in this Presidency, and that the ordinary rule of the senior widow having a preferential right to adopt has no application to the present case.

It is clear that if Bala, the predeceased son, had been a separated member of the family, there could be no doubt as to the right of Tanu to adopt even without the consent of her father-in-law on the footing of her having an infant son. After the death of her infant son she would take the property as the mother and heir of her infant son, and she would be entitled to make an adoption: see *Gavdappa v. Girimallappa* (1) and *Verabhai Ajubhai v. Bai Hiraba* (2).

In the present case however the predeceased son died in union with his father. Even in such a case it has been held that the widowed daughter-in-law could adopt with the consent of the father-in-law: see *Vithoba v Bapu* (3). The observations of Ranade, J., in *Gopal Balakrishna v. Vishnu Raghunath* (4) support this view.

It is urged however that the father-in-law cannot give his consent in derogation of the preferential right of the senior widow to adopt. The preferential right of the senior widow exists when the widows inherit the property of their husband, that is, when the husband is a separated member of the family; and even then it is subject to any

(1) [1895] 19 Bom. 331.

(2) [1908] 27 Bom. 492=30 I. A. 284=5 Bom. L. R. 534=7 O. W. N. 716 (P.O.).

(3) [1891] 15 Bom. 110.

(4) [1899] 23 Bom. 250.

authority given by the husband to the junior widow to adopt or any express or implied prohibition by the husband against the senior widow. This is clear from the observations in *Rakhmabai v. Radhabai* (5). But no authority is cited in support of the contention that in the case of an undivided family where the father-in-law's consent is necessary to validate an adoption by a widowed daughter-in-law, the consent ought to be given to the senior daughter-in-law. The principle underlying the recognition of preferential right of the senior widow to adopt, in my opinion, has no application to a case where the adoption can be justified only by the consent of the father-in-law. The preferential right of the senior widow does not exist, apart from the will of the father-in-law. The doctrine of the preferential right of the senior widow to adopt has not been extended to a case where the husband dies in union with his father, and where the widow can adopt, if at all, with the consent of her father-in-law; and I see no justification in Hindu law for such an extension.

The case of *Raja Venkatappa Nayanam Bahadur v. Renga Rao* (6), relied upon by Mr. Patwardhan, has no application to the present case. It has been held in this case that an adoption by a junior widow without the consent of the senior widow is not valid even though it purports to be made with the consent of the Sapindas. In this Presidency the exception recognised in favour of the validity of an adoption made by the daughter-in-law with the consent of the father-in-law does not stand on the same footing as an adoption made by a widow with the consent of the Sapindas in Madras. This point is examined in *Vithoba v. Bapu* (3). The Madras case to my mind is clearly distinguishable, having regard to the different views that prevail in Madras and Bombay as to the basis of the widow's power to adopt after her husband's death. Though there may be apparently something common between the consent of the kinsmen which is required even when the husband is separated in interest from them, and the consent of the father-in-law required in this Presidency when the predeceased son dies in union with his father to vali-

date an adoption by the widowed daughter-in-law, I do not think that the latter is subject to the same limitation as the former as regards the preferential right of the senior widow to adopt.

It is further urged that the consent of Pandu alone is not sufficient as he had already adopted the present plaintiff as his son, and as the plaintiff had a vested interest in the estate as a co-parcener. I do not think that the consent of the plaintiff was necessary to validate the adoption. The consent of the father-in-law is recognized as sufficient on account of the position which he occupies as the head of the family. It makes no difference whether he has other sons or not, and whether they consent or not. His consent has a certain legal effect on the adoption and that is independent of the existence and consent of the other co-parceners. That is the ratio decidendi in *Vithoba v. Bapu* (3).

Lastly it remains to consider whether the fact that Tanu had an infant son put an end to her power to adopt with the consent of her father-in-law. The infant son does not appear to have attained the age of ceremonial competence, and I do not think that the fact her having an infant son, who died prior to the adoption, could put an end to her power to adopt with the consent of her father-in-law.

It is not necessary to consider in this case whether the adoption would be valid if the infant son had attained ceremonial competence: and I desire not to be understood as expressing any opinion on the question. I desire to add that the fact of Tanu having an infant son does not appear to have been relied upon by either side in the lower Courts: and there is no finding on this point. It is recited as a fact in the deed executed by Pandu, even if Tanu had no infant son, I think that the adoption of defendant 11 by her with the consent of her father-in-law would be valid.

No question is raised in this litigation as to the validity of the plaintiff's adoption by Pandu on the footing of Tanu having an infant son at the date of the adoption.

I would therefore confirm the decree of the lower appellate Court and dismiss the appeal with costs.

G.P./R.K

Appeal dismissed.

(5) [1868-69] 5 B. H. C. R. (A. C.) 181.

(6) [1916] 39 Mad. 772=30 I. C. 106.

A. I. R. 1920 Bombay 29

MACLEOD, C.J. AND HEATON, J.

Ramchandra Kolaji Patil and others
—Plaintiffs—Appellants.

v.

Hanmanta Laxman Kadaskar and others—Defendants—Respondents.

Second Appeal No. 195 of 1918, Decided on 7th January 1920, from decision of District Judge, Ahmadnagar, in Appeal No. 80 of 1916.

Civil P. C., (5 of 1908), O. 23, R. 2—Limitation within which to bring fresh suit cannot be imposed by Court allowing withdrawal.

Plaintiff brought a suit for redemption but was allowed to withdraw it with leave to bring another suit within 2 years. He filed another suit for redemption more than 2 years after the withdrawal of the first suit:

Held: that it was not open to the Court in the first suit to impose a limitation of time within which the second suit must be brought, and that so long as the second suit was brought within the ordinary period of limitation applicable thereto it was not barred. [P 29 C 2]

P. V. Nijure—for Appellant.

B. J. Desai and P. V. Kane—for Respondents.

Macleod, C. J.—This was, in effect a redemption suit filed by the plaintiffs in 1914 to redeem and recover property mortgaged in 1902. It appears that the plaintiffs filed suit No. 220 of 1905 to redeem the mortgage, but not wishing to proceed with that suit they were allowed to withdraw it with permission to bring a fresh suit provided that such suit was brought within 2 years, and that the costs of defendants in that suit were first paid. This suit was brought 8 years after the withdrawal, and the plaintiffs' suit has therefore been dismissed on the ground that they have not complied with the conditions imposed by the order allowing them to withdraw the first suit. It appears to us that the Court has failed to consider what was the nature of the suit filed in 1905. It is also possible that the considerations which induced the Full Bench to decide the case of *Ramji v. Pandharinath* (1) had not been recognized in the previous decisions of the Indian Courts. The effect of the order made by the Court in the previous suit was to restrict the period of limitation which is allowed by law to a mortgagor to redeem. So long as it has not been decided that there was no mortgage at all, then the relation-

ship of mortgagor and mortgagee existed. The law allows a particular period to the mortgagor within which he can redeem the mortgage. The mere fact that he files a suit to redeem and then either abandons or withdraws it will not deprive him of his right to redeem. It is only when there has been a decision that there was no mortgage at all that it necessarily follows that the right to redeem which has been set up falls to the ground. The result therefore of the decision of both Courts in this case would be that, although it has never been decided that the plaintiff is not a mortgagor, still he has no right left in him to redeem the property, and that, on general principles, must be wrong. Therefore in my opinion the view taken by the learned District Judge and the order made in Suit No. 220 of 1905 was erroneous and there was nothing in that order which affected the plaintiff's right to redeem during the period of limitation allowed by the Limitation Act. We set aside the decree of the lower appellate Court and remand the case for findings on facts. Costs, costs in the cause.

Heaton, J.—The only matter of importance with which we are concerned is, whether the present suit is beyond time. The plaintiffs who brought an earlier suit for redemption had been allowed to withdraw that suit with leave to bring another, provided they brought that other within 2 years. They have now brought another suit for redemption; but they have not done so within 2 years; they have, indeed, allowed eight years to elapse. Apart from any other matter whatever having regard to S. 374, Civil P. C., of 1882, which lays down that the law of limitation is not affected when leave is given, I should say that it was not open to the Court to impose a limitation of 2 years. Consequently I should hold that the suit is within time. My Lord the Chief Justice, has dealt with another aspect of the case, namely, that the right to bring a suit for redemption is not lost so long as there has not been the decision of a Court against the existence of the relationship of mortgagor and mortgagee. No doubt that in general is so, but I do not at present myself wish to express any opinion whether, supposing a plaintiff brings a suit for redemption and abandons it, he would then have, or would not have, a

(1) [1919] 43 Bom. 384=49 I. O. 894.

right to bring a fresh suit for redemption. The particular matter before us can be disposed of, I think, without expressing an opinion on that point. I agree that the case should be remanded to be determined by the Court of first appeal on its merits. Costs, costs in the cause.

G.P./R.K.

Case remanded.

A. I. R. 1920 Bombay 30

MACLEOD, C. J. AND HEATON, J.

Balgauda Laxmangauda Patil—Defendant—Appellant.

v.

Mallappa Virupaxappa Tubli—Plaintiff—Respondent.

Second Appeal No. 293 of 1918, Decided on 27th November 1919, from decision of 1st Class Sub-Judge, Belgaum, in Appeal No. 192 of 1916.

Civil P. C. (5 of 1908), S. 47 and O. 21. R. 92—Sale in execution held by Collector—Application to set aside sale—Collector's order confirming sale before disposal of that application is ultra vires—Suit to set aside sale is maintainable—Scope of S. 47 stated.

Where the execution of a decree is transferred to a Collector, and in the proceedings held before him he puts property up for sale and it is sold and an application is made to him within the time limited by law to set aside the sale, he is bound to refer the application to the civil Court, because he has no power to deal with it and all his powers of confirming the sale are suspended until that application is disposed of. If after, such application has been made, he confirms the sale, his action is ultra vires and a suit will lie for a declaration that the sale is void.

Section 47 has no application where the decree-holder, in the suit in which execution is asked for, is not a party to the proceedings.

[P 30 C 1,2]

S. R. Parulekar, for *A. G. Desai*—for Appellant.

S. R. Bhakhale—for Respondent.

Macleod, C. J.—The decree of the lower appellate Court was perfectly correct. The facts are set out at p. 2. The learned Judge has properly appreciated the rules which refer to the case. When a decree has been transferred to the Collector for execution, and he has put up the property for sale, and it has been sold, then he has a certain power to confirm the sale. That was given to him by R. 16 (2) at p. 106, Civil Court Manual, namely:

"The power referred to in para. 1, S. 312, Code of 1882 (present O. 21. R. 92 (1), Code of 1908) to pass an order confirming a sale if no application to set aside the sale has been made

within the time limited by law, or if every application so made has been disallowed,"

and R. 17 provides that the application to set aside a sale, if it is made within the time limited by law to the Collector, shall be referred to the civil Court. It follows then that once an application is made within the time limited by law to the Collector to set aside the sale, the Collector is bound to refer the application to the Court, because he has no power whatever to deal with that application himself. But as soon as the application is made to him within the time limited by law, which is 30 days from the date of the sale, then all his powers of confirming the sale are suspended until that application has been disposed of. In this case he appears to have ignored the application to set aside the sale and proceeded to confirm it. In so doing, he was acting clearly ultra vires, and a suit will lie for a declaration in favour of the plaintiff that the sale is void.

It has been argued that the plaintiff should have proceeded in execution under S. 47 of the Code. That section will not apply in this case, because the decree-holder in the suit in which execution was asked for is not a party to these proceedings, and it is only when questions arise between the parties to the suit in which the decree was passed, or their representatives, that those questions must be determined by the Court executing the decree, and not by a separate suit. Here the decree holder was not a party nor the representative of a party. The judgment-debtor deposited the money with the Collector or the Mamlatdar, and then proceeded to ask the Collector to set aside the sale. The only questions which arose were purely questions between himself and the auction-purchaser who was an outsider to the original suit, and was neither a party nor a representative of any of the parties. Therefore, the decree of the lower appellate Court was perfectly correct and the appeal must be dismissed with costs.

Heaton, J.—I concur.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 31

MACLEOD, C. J. AND HEATON, J.

B. D. Pudumji—Defendant — Appellant.

v.

Dinshaw Manekji Petit — Plaintiff—Respondent.

Original Civil Jurisdiction No. 2 of 1920, Decided on 25th February 1920, from decision of Kajiji, J.

(a) Bombay Rent Act (2 of 1918), S. 9—S. 9 does not prevent improvement of old houses—Court's duty stated.

It was never intended by the Bombay Rent Act that the improvement of old, ill-erected, badly ventilated premises should be entirely stopped until the Rent Act is repealed. All that the Courts have to do in construing S. 9, is to see that the landlord is acting reasonably.

[P 31 C 2]

(b) Bombay Rent Act (2 of 1918), S. 9—Whether landlord is acting reasonably—How to be determined stated.

In order to determine whether a landlord is acting reasonably within the meaning of S. 9, the Court should confine itself to the condition of the premises in question and should not allow its decision to be affected by the fact that the landlord owns other buildings in respect of which he should follow a certain line of action.

[P 31 C 2, P 32 C 1]

Mirza and Desai—for Appellant.*Strangman, Inverarity and Kanga* — for Respondent.

Macleod, C. J.—The plaintiff brought this suit against the defendant praying that the defendant might be ordered to vacate and give up possession of certain premises in his occupation to the plaintiff. The defendant is a monthly tenant of certain premises in a house belonging to the plaintiff on Hornby Road.

The defendant has pleaded the Rent Act, and denies that the premises in suit are reasonably and bona fide required by the plaintiff for demolishing the same and for erecting a new building.

Now, admittedly the house in which the defendant is a tenant together with the adjoining house is very old. The rooms are dark and badly ventilated; and certainly it would tend to the improvement of the premises, and for the better conditions of the tenants who would occupy the new premises, that the present house should be pulled down and a new house built on the site with all modern conveniences. I cannot see therefore that there was anything unreasonable in the plaintiff's conduct in wishing to get the tenants of the present house to vacate in order that proper improvements might be made. It was

never intended, as far as I can see, by the Bombay Rent Act that the improvement of old, ill-erected, badly ventilated premises should be entirely stopped until the Rent Act is repealed. All that the Courts have to do in construing S. 9, Bombay Rent Act is to see that the landlord is acting reasonably. If it was found that the owner of a perfectly new building, built just before the Rent Act came into operation, wanted to pull down that building and build another one, it is quite possible that in these circumstances the Court would think that the landlord was quite unreasonable. In this case we have none of those circumstances. We have two houses which, it is certainly desirable, should be replaced by modern houses. Therefore if this house was the only house that was mentioned in the case, it seems to me that the plaintiff is entitled to get the defendant to vacate.

But it is argued for the defendant that the plaintiff has another house in which he himself is occupying a room for the purposes of his office, while other rooms are occupied by companies in which the plaintiff is interested and that the plaintiff is really pulling down what I may call the defendant's house in order that he may rebuild on the site new offices for himself and his other companies, because the present office building is likely to become unsafe in the near future. The defendant therefore suggests that the plaintiff ought to move himself from his present office building to the top floor of the defendant's house and pull down the office building before he pulls down the defendant's building. That, no doubt, would be an alternative. But is there any necessity by which the plaintiff is bound to follow that alternative, which would be convenient to the defendant but would be less convenient for the companies in which the plaintiff is interested and who have rented premises in the office building? Can it be said that the plaintiff is acting unreasonably and not bona fide if he follows the alternative which suits him best. And unless we can hold that in the case of two alternatives the plaintiff must follow one and if he follows the other his conduct is unreasonable, the defendant is bound to fail. I do not see myself how one can pin down the plaintiff to follow one particular alternative when to follow the

other is perfectly reasonable; certainly when you look at the plaintiff's ownership of the suit house without considering his ownership of other premises, there would be absolutely nothing unreasonable in his wanting to pull down that house and build another on its site. In my opinion therefore the judgment of the Court below was right, and the appeal must be dismissed with costs.

Heaton, J.—I concur.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 32

SHAH AND HAYWARD, JJ.

Sadashiv Ramchandra Datar and another—Defendants—Appellants.

v.

Trimbak Keshav Vaze—Plaintiff—Respondent.

Second Appeal No. 709 of 1917, Decided on 25th August 1919, from decision of Asst. Judge, Poona, in Appeals Nos. 230 and 231 of 1914.

(a) Civil P. C. (5 of 1908), Sch. 2, Para. 1—Reference to arbitration by natural guardian if proper and reasonable, award will be binding on minor.

An arbitration can be entered into on behalf of a minor by his natural guardian, provided it is for his benefit, or reasonable and proper for the protection of his property, but the award would not be binding if that were not the case.

[P 33 C 2]

(b) Civil P. C. (5 of 1908), O. 32, R. 3 and Sch. 2, Para. 1—Decree on award on reference by consent of guardian mother—Mother not appointed guardian—Decree resulting in sale for undervalue—Absence of appointment of guardian held serious mistake and award held not binding.

Where a mother, as the natural guardian of her minor son, consented to a reference to arbitration and accepted the award on behalf of the minor and raised no objection to the passing of a decree in terms of the award, but no appointment of the mother as guardian of the minor had been made, as required by S. 443, Civil P. C. 1882, and the subsequent result of the decree was a sale of the property in dispute for an undervalue:

Held: that the minor's interests had not been duly protected; that the omission to appoint a guardian was not a mere irregularity which could be condoned, and that the decree based on the award and the sale of the property were null and void.

[P 34 C 1]

Jayakar and V. V. Bhadkamkar—for Appellants.

Patwardhan and V. D. Limaye—for Respondent.

Shah, J.—The facts which have given rise to this second appeal are these:

The father of the present plaintiff mortgaged the house in suit on 4th

December 1896 to defendant 1 for Rupees 1,000 with interest at 6 per cent.

The plaintiff's father died in 1899 leaving a son, the present plaintiff, and a widow, the plaintiff's mother. In 1901 the mortgage claim was referred to arbitration by defendant 1 and the mother of the plaintiff who was then a minor. An award was made in May 1901, under which the minor represented by his mother was to pay Rs. 1,000 and Rs. 200 and odd as interest with further interest at 6 per cent. on the principal within one month and the property was to be sold in case the money was not paid within the time specified. The present defendant 1 applied to the Court on 12th June 1901 to have a decree in terms of the award, and the present plaintiff's mother filed a statement on 13th June 1901, in which she consented to a decree being passed in terms of the award and stated that she had no objection to the award being filed in Court. She appeared through a pleader. A decree was accordingly passed in terms of the award on 19th June 1901. In execution of the decree the house was sold in November 1902 and purchased by the present defendant 1 for Rs. 1,700.

On 10th August 1912 the plaintiff after attaining majority filed the present suit to set aside the decree passed in terms of the award. The defendants contested the suit and several issues were raised representing the rival contentions between the parties.

The trial Court on a consideration of the evidence found that the plaintiff was not bound by the decree on the award, nor by the sale in execution of that decree and that he was entitled to the relief on the footing of the original mortgage of 1896. The accounts were taken under the Dekkhan Agriculturists' Relief Act as the plaintiff was an agriculturist, and a decree was passed in respect of the amount that was found due to the mortgagees on the mortgage.

The defendants appealed to the District Court of Poona, and the learned Assistant Judge has affirmed the decision of the trial Court on the main point that the plaintiff was not bound by the decree on the award, and subject to a certain variation in the amount payable to the mortgagees, has upheld the decree of the trial Court.

The defendants have applied to this Court, and it is urged on their behalf that the decree is binding upon the present plaintiff. It is urged that it was open to the mother as the natural guardian of the plaintiff to refer the matter to an arbitration and that as neither fraud nor undue influence is proved, the award must be taken to be binding upon the parties. It is also urged that though there may have been some irregularity in the proceedings to file the award in Court in so far as no formal order was made appointing the mother as the guardian of her minor son, under the circumstances it must be taken to be a mere irregularity, which has not in any way prejudiced the interests of the minor.

It is conceded before us that apart from this objection relating to the decree on the award there is no further objection to the decree as passed by the lower appellate Court, that is, if the plaintiff is entitled to have relief on the footing of the mortgage of 1896 without any reference to the award proceedings, the decree now under appeal is not open to any objection. The principal question, therefore is whether the lower Courts are right in holding that the decree in terms of the award is not binding upon the minor and that it is liable to be set aside at his instance.

It has been urged in support of the view taken by the lower Courts that there was no appointment of a guardian as required by S. 443 of the Code, 1882, and that all the proceedings which resulted in the decree and the sale of the property are null and void, and further that under S. 462 of the Code, 1882, corresponding to O. 32, R. 7, of the present Code the leave of the Court for filing the award was necessary and that in the absence of such leave the decree based on the award is voidable at the instance of the minor.

The lower appellate Court has found that in the present case there has been a serious prejudice to the minor, as he has been deprived effectively of the benefit of the provisions of the Dekkhan Agriculturists' Relief Act, as the full amount was found payable by him without taking any account under the Dekkhan Agriculturists' Relief Act, as no instalments were allowed and as the time fixed for the payment of the whole sum was only one month. The lower appel-

late Court has not gone into the question of the valuation of the house and has not expressed any opinion on the finding recorded by the trial Court that the house was in fact sold for nearly half the amount of its real market value.

I shall first deal with the point relating to the irregularity in the proceedings initiated by the present defendants on the award arising in consequence of no appointment of a guardian for the minor defendant having been made in those proceedings. It is clear that under S. 443 of the Code then in force it was incumbent upon the Court to appoint a proper person to be the guardian for the minor defendant in those proceedings which under the provisions of the Code were to be treated as a suit. All the papers connected with those proceedings are before the Court; and it is clear from those papers—and that is the conclusion reached by the lower appellate Court—that as required by S. 443 no appointment of the mother or any other person as the guardian of the minor defendant was made. The question is as to the effect of this omission to appoint a guardian. When due regard is had to all the circumstances connected with these proceedings, it is difficult to avoid the inference that the minor's interests were not protected. The appearance of the mother as soon as the application for a decree in terms of the award was presented through a pleader who is now stated by the mother to have been selected for her by the present defendant 1, and her consenting to a decree being passed in terms of the award are circumstances of some suspicion. When we have due regard to the terms of the award and the subsequent result of the decree, namely, a sale for an undervalue in favour of the defendants, the conclusion of the lower appellate Court that the minor's interests had not been duly protected must be accepted. The inference is clear that the minor was not effectively represented in the proceedings initiated by the present defendants in 1901 and that the decree passed in those proceedings on the award and the subsequent proceedings in execution resulting in the sale of the property in favour of defendant 1 must all be treated as null and void.

It is not necessary to refer to all the decisions which have been cited in the course of the argument; but I may refer

to the case of *Partab Singh v. Bhabuti Singh* (1) as supporting the above conclusion. The appellants have relied upon the decision in *Mt. Bibi Walian v. Banke Behari Pershad Singh* (2), but the ratio decidendi seems to me to be against the appellants. Their Lordships clearly point out in that case that it is obligatory upon the Courts to comply with the provisions of S. 443, and the irregularity in that case was condoned on the ground that on the particular facts, the minor was held to have been effectively represented.

In the present case the question whether the omission on the part of the Court to comply with the provisions of S. 443 should be condoned on a similar ground or not is a matter which must be decided with reference to the facts of this case. Both the Courts have taken the view on the facts against the defendants, and it seems to me that the conclusion reached by the lower Courts on this point is right.

In view of this conclusion it is not necessary to consider the further question which has been argued at some length in this appeal, as to whether the leave of the Court under S. 462 was necessary to give effect to the consent of the mother that a decree might be passed in terms of the award. This question involves the consideration of the point as to whether, when the mother appeared through a pleader on 13th June 1901 and gave her consent to a decree being passed in terms of the award, she acted in pursuance of any agreement between her and defendant 1 or not. If the facts could reasonably give rise to the inference that there was such an agreement between the parties, no doubt the provisions of S. 462 would apply and the absence of any leave of the Court for such an agreement with reference to the suit to file the award in Court would entitle the minor on attaining the age of majority to avoid the decree. Whether there was such an agreement between the plaintiff's mother and defendant 1 is really a question of facts. It is urged for the plaintiff that the facts justify an inference as to such an agreement between his mother and defendant 1 and that the decision in

Mahadev Balkrishna Kelkar v. Krishnabai (3) supports their contention. On the other hand, it is urged that apart from the agreement to refer the matter to an arbitration there is no further agreement with reference to the suit to file an award in Court, and Mr. Jayakar has relied upon the recent decision of the Full Bench in *Hanumantram Radhakisan v. Shivnarayan Asuram* (4). It is not necessary to pursue this point, or to discuss the cases which have been cited with reference to the applicability of S. 462 to facts such as we have in this case.

The appeal therefore fails and the decree of the lower appellate Court is confirmed with costs.

The cross objections which are not pressed are dismissed with costs.

Hayward, J.—I agree. An arbitration can be entered into on behalf of a minor by his natural guardian, provided it is for his benefit or reasonable and proper for the protection of his property, but the award would not be binding on him if that were not the case. The question of its binding effect could of course be decided in subsequent proceedings in which the minor was properly represented by his guardian. Such proceedings would include those taken for filing the award, because the jurisdiction to file it would depend upon the question whether or not the award had been based upon due authority given on behalf of the minor by his natural guardian. It was held that that was a question to be decided in such proceedings in decisions on S. 526 of the old Civil Procedure Code, and the substance of those decisions has been incorporated in the opening words "where the Court is satisfied that the matter has been referred to arbitration," of para. 21, Sch. 2 of the present Civil Procedure Code. Where the question of the legality of the reference is not taken in such proceedings, the ordinary inference would be that it was held to have been legal, so that here where the legality was not called in question, the point to be considered would be whether the minor was only represented in the proceedings by his natural guardian, i. e., in the proceedings taken to file the award.

Now a minor would not ordinarily be properly represented unless his guardian was formally appointed as such by the

(1) [1913] 35 All. 487=40 I. A. 182=21 I. C. 288=16 O. C. 247 (P. C.).

(2) [1903] 30 Cal. 1021=30 I. A. 182=8 Sar. 512 (P. C.).

(3) [1896] P. J. 609.

(4) [1916] 43 Bom. 255=48 I. C. 238 (F. B.).

Court... But on the other hand where the guardian was tacitly accepted throughout the proceedings as a proper person representing the minor and where the irregularity of not formally making the appointment in writing had not affected the merits, then no doubt the minor would be held to have been duly represented by his guardian by reason of the provisions of S. 578 of the old Civil Procedure Code, which is now S. 99 of the present Code. So that the real question, in my opinion, has been reduced to this: whether the minor was or was not prejudiced by the irregularity of his natural guardian, his mother, not having been formally appointed by the Court. It has been definitely held that there was prejudice by the first appeal Court, and it seems to me difficult for us to say that that finding is wrong in view of the several circumstances which were brought to light.

It was thus found that the ordinary procedure for settling the dispute between the parties would have been one in which the whole history of past transactions would have been enquired into under the provisions of the Dekkhan Agriculturists' Relief Act and that in place of this ordinary procedure the special procedure was adopted of referring the matter to the sole arbitration of an arbitrator specially selected by the minor's opponents. It was *prima facie* not for the benefit of the minor to substitute this special procedure before the Special Judge chosen by his opponents, and this *prima facie* conclusion was proved to have been correct by the subsequent result.

The award was for the whole amount claimed and ordered it to be paid within one month, instead of the six months which would have been the least allowed by the ordinary procedure, quite apart from the question whether or no instalment could not have been granted under the provisions of the Dekkhan Agriculturists' Relief Act. Then the sale that resulted was far from satisfactory. The property was sold for Rs. 1,700 and was brought by the minor's opponents. The real value would appear to have been anything from Rs. 2,500 to Rs. 3,500. These latter facts were elicited at the trial, though they have not been referred to in the judgment of the first appeal Court. It seems to me that that is sufficient to justify us in holding that their regularity of not formally deciding whe-

ther the minor's natural guardian, his mother, was or was not a proper person to represent him in the proceedings did affect the merits. It would seem to me that this circumstance tends strongly to show that the irregularity did most certainly affect the merits and prejudice the minor. If the question had been carefully considered, as it ought to have been, there is every probability that some other guardian would have been appointed such as the Nazir of the Court, who would have fully enquired into the circumstances of the arbitration. It seems to me that on this ground we ought to uphold the decree of the first appeal Court.

It is not necessary in these circumstances to consider the other question argued before us, that is to say, whether there was an agreement between the minor's natural guardian, his mother, and the minor's opponents that the award should be filed without objection in Court. If there had been any such formal agreement, then no doubt it would have been necessary to have obtained the formal sanction of the Court. But it is not necessary here to discuss that matter further, as upon the other ground it seems to me clear that we ought to uphold the decree of the first appeal Court and dismiss this appeal with costs.

G.P./R.K.

Appeal dismissed.

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MACLEOD, C. J. AND HEATON, J.

Dattatraya Durgappa and others—Defendants—Appellants.

v.

Pundlik Narayan Pandit—Plaintiff—Respondent.

Second Appeals Nos. 932 to 934 of 1918, Decided on 30th January 1920, from decision of Dist. Judge, Canara, in Appeals Nos. 184 and 185 of 1916.

Civil P. C. (5 of 1908), S. 73 and Sch. 3 Cl. (9)—Execution sale by Collector—When assets will be deemed to have received within S. 73 stated.

Where a decree is sent to the Collector for execution and the Collector sells the property of the judgment-debtor, then, as soon as the whole of the purchase money agreed to be paid at the sale is paid to the Collector, it becomes assets received and held by the Court within the meaning of S. 73 and an application for rateable distribution made after that date must be treated as out of time. [P 27 C 1]

Y. N. Nadkarni—for Appellants.

S. R. Bakhale and G. P. Murdeshwar—for Respondent.

Macleod, C. J.—The plaintiff obtained a decree in Suit No. 356 of 1910 against two of his debtors. In execution of that decree the plaintiff attached certain immovable property belonging to the said judgment-debtors. The property was put up for sale by the Collector on 18th January 1915. The whole of the said proceeds were received on 3rd February 1915 and were forwarded to the Court, which had sent the decree for execution to the Collector on 4th March 1915. Thirteen creditors of the judgment-debtors applied for rateable distribution of the assets received in execution. The plaintiff had to file this suit, because he objected to five of them, the present defendants 1 to 5 sharing in the rateable distribution and he had to make the other seven parties, now defendants 6 to 12, as they were the other execution-creditors. Although, as regards defendant 1, it was held that the restoration of the application was correct, apparently he was not allowed by the trial Court to share in the distribution, and the decree of the trial Court was confirmed in first appeal. He has not appealed to us. Therefore as far as he is concerned, his application to share in the distribution must be considered as refused.

As regards defendants 2, 3, 4 and 5 the question is : whether they filed their application before the receipt of the assets within the meaning of S. 73, Civil P. C. That section says :

"Where assets are held by a Court and more person than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization all shall be rateably distributed among such persons."

I first draw attention to an obvious mistake which was made by both the lower Courts, viz., that Cl. 1 (c), S. 73, applied to the facts of this case. Both Courts seem to be of opinion that in cases where the assets come to the hands of the Court by sale of immovable property, applications to share in the sale-proceeds must be made in order to be in time, prior to the sale. But Cl. 1 (c), S. 73, only refers to cases of immovable property being sold in execution of a decree ordering the sale for the discharge of an incumbrance thereon. It is only if there is a balance after discharging the expenses and the incumbrances, that the

balance can be rateably distributed amongst those creditors who have, prior to the sale of the property applied to the Court. But where property has been realised in execution of a decree other than a decree referred to in S. 73 (1) (c), then the important date is the date of the receipt of the assets by the Court, and the only question is whether when a decree has been sent to the Collector under the rules for execution and when the Collector has sold the property and received the sale proceeds, it can be said that the assets are held by the Court and have been received by it. Para. 9, Sch. 3, Civil P. C., lays down what the Collector should do when he sells the property under the orders of the Court. He has to render accounts to the Court of all moneys which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of the schedule, and then he shall hold the balance at the disposal of the Court. Therefore the Court, on receiving an account from the Collector, can direct him to pay what is due to the executing creditors and the actual cash need never come into the hands of the Court. So that, if the appellant's argument were correct, it follows that there would be no time fixed before which applications should be made for rateable distribution as the assets might never be received by the Court at all.

I do not think it necessary to consider the question whether the Collector is the agent of the Court. The word "agency" generally arises in questions of contract. There is no reason why, when the Court is given powers by statute to appoint the Collector as its officer to execute the decree, it may not be said that the Collector is the officer of the Court with certain delegated powers ; for instance he is empowered to confirm the sale although he has no power to set aside the sale. Since the Collector has to hold the money of the sale proceeds at the disposal of the Court, the Court can draw against those sale proceeds and direct how they shall be dealt with in the same way as a person may draw against his balance with his bank. We must hold that when the Collector receives the sale proceeds in execution, then the assets are held by the Court and have been received by the

Court. But the assets are received, by the Court when the whole of the purchase money has been received, not when a deposit merely has been received according to the conditions of sale when the sale takes place. But when the whole of the purchase money agreed to be paid at the sale is paid to the Collector then I think that the purchase money must be treated as assets held by the Court and received by the Court. Any application made thereafter by a judgment-creditor for rateable distribution must be out of time.

Therefore in my opinion these appeals fail and must be dismissed with costs.

Heaton, J.—In order that the provisions of S. 73, Civil P. C., can be applied there must be two things: a receipt of assets, and a holding of those assets by the Court. When a sale of immovable property in execution is transferred to the Collector, the Collector or one of his subordinate officers actually receives the sale proceeds and that is what happened in this case. Cl. 9, Sch. 3, Civil P. C., lays down what the Collector has to do with the money that he so receives. It is quite plain from this clause that he is not directed, at any time whatever, to remit the money to the Court. It is perfectly true that he sometimes does remit the money, after deducting necessary charges to the Court, as he did in this case. But whether he does that or not depends altogether upon the particular system which obtains in a particular province or district. The Collector can just as well make every payment as can the Court. It is clear therefore that theoretically, there might be—and I have no doubt that actually there are—cases in which the sale proceeds i. e., the assets, are never received by the Court at all in the narrow sense of actually being paid into Court or to one of the officials of the Court. And yet, although there is no receipt of assets by the Court in the narrow sense, there can be, and rightly can be, a rateable distribution. If that is the result of the law—and it seems to me to be inevitably a possible result, and very properly and rightly a result—then the receipts by whomsoever they are held must be deemed to be held by the Court. And they are very properly deemed to be held by the Court because they consist of money which is at the disposal of the

Court and which cannot be paid to anybody except under the Court's order.

It seems to me therefore that in this case the law shows us, and plainly shows us that 3rd February 1915 the date on which the price was paid to the Collector, is that date before which applications for rateable distribution were to be made if they were to be allowed under S. 73. The particular applications we are dealing with were not made before that date, so they cannot be allowed.

The result is that the decrees of the lower Court are confirmed.

G.P./R.K.

Decrees confirmed.

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MACLEOD, C. J. AND HEATON, J.

Gurmaliappa Mallappa Katti and others—Defendants—Appellants.

v.

Mallappa Martandappa Teli and another—Plaintiffs—Respondents.

Second Appeal No. 661 of 1917, Decided on 21st November 1919, from decision of First Class Sub-Judge, Belgaum, in Appeal No. 100 of 1916.

Civil P. C. (5 of 1908), O. 32, R. 7—Natural guardian's power pending suit when not appointed guardian ad litem are suspended—Compromise of suit without Court's sanction is not valid.

When a minor is represented in a suit by a guardian ad litem other than his natural guardian, the powers of his natural guardian to deal with the minor's interests which are involved in those proceedings are suspended. [P 93 C 2]

Per *Heaton, J.*—O. 32, R. 7 implies that during the continuance of proceedings in Court the dispute between the minor and another party which the Court has to decide cannot be compromised except by the guardian ad litem of the minor, and by him only, with the leave of the Court. [P 39 C 1]

Jayakar and A. G. Desai—for Appellants.

Nilkant Atmaram—for Respondents.

Macleod, C. J.—The facts of this case are very clearly set out at p. 6 of the print.

The plaintiffs are minors and in effect their mother as next friend has sued to set aside the sale deed of the 17th July 1906 passed by her as their natural guardian. It has been found by both the lower Courts that the deed was passed for legal purposes, but the sale deed has been declared to be void on the ground that the sanction of the Court was necessary. This, on the facts stated, involves a confusion of ideas. It is true that on an award decree against the plaintiffs'

father execution proceedings were commenced against the minors represented by one Baslingapa as their guardian ad litem, after which terms of compromise were arranged. An application to the Court was presented by both parties intimating they had entered into a compromise. The plaintiffs' application was signed however not by Baslingapa but by their mother. The Court recorded it, without granting or rejecting it. Clearly the application signed by plaintiffs' mother was not in order. Thereafter the Court passed an order in execution.

In spite of that the mother executed the sale deed now in question, and as it has been found that it was for legal purposes and for the minor plaintiffs' benefit it cannot be avoided unless it can be held that the powers of their mother as their natural guardian to satisfy the decree passed against their father were entirely suspended from the time the execution proceedings commenced, or must be taken as suspended in consequence of her own action. The fact that Neelava agreed to sell the lands on the same terms as had been agreed upon by the compromise apparently made with the guardian ad litem, which was never sanctioned by the Court, is a mere coincidence and is irrelevant to the general question which we have to deal with, and which, so far as can be discovered, has not yet been decided by the Courts in India. The question was referred to in *Ganesha Row v. Tulsa Ram Row* (1), but their Lordships of the Privy Council said then that that question was not in issue on the facts of that case; as the father of the minor had been appointed guardian ad litem in the suit, and his powers of management, so far as they related to the minor's interest in the suit were held to be controlled by the provisions of S. 462 of the Code of 1882. Now in this case a decree was passed against the minor's father based on an award, and after his death the creditors sought to execute it against his heirs. Neelava could have settled that claim by transferring these lands to the creditors and receiving Rs. 175. and on the facts found such a transaction could not now be disputed.

I fail to see why she could not have so settled the creditors' claim, disregarding altogether the execution proceedings, as

she was not representing the minors in them. The transferee could then take the usual risk of the transaction thereafter being set aside, if it were proved that the minors' guardian had exceeded her power as such guardian. My brother Heaton however thinks that on general principles, when a minor is represented in a suit by a guardian ad litem other than his natural guardian, the powers of his natural guardian to deal with the minor's interests, which are involved in those proceedings are suspended. I am not prepared to go so far as that, but on the facts in this case I am not disposed to differ, as Neelava had applied to the Court to sanction the compromise and thereby, I think, she put it out of her power to settle the creditors' claim as the minors' natural guardian without the Court's consent.

I should also like to point out that though S. 462 of the Code of 1882 applied and O. 32, R. 7 of the present Code applies to execution proceedings there seems to me to be a distinction between a case where the minor's liability has already been determined by a decree in his father's lifetime, and a case where the minor's liability in the first instance is in dispute. For, in the former case, there is a debt which the guardian is clearly entitled to pay off in full and the fact that the judgment-creditor has issued execution against the minor making an outsider his guardian ad litem does not, in my opinion, alter the situation.

The appeal will be dismissed with costs.

Heaton, J.—I need not re-state the facts.

The matter seems to me to be one of importance as a matter of principle. If you take the bare words of S. 462 of the old Code (now O. 32, R. 7), they do not cover this case as there was not a compromise by the guardian ad litem. Therefore it may be said that there was not anything for which the leave of the Court was required. But there was a compromise during the continuance of the proceedings and it was a compromise which settled the very matter which was before the Court. The intention so to compromise the matter was brought to the notice of the Court. The Court declined to give effect to that intention, for it continued the proceedings before it and made an order contrary to that intention.

(1) [1913] 36 Mad. 295=40 I. A. 132=19 I. C. 515 (P. C.).

Yet the compromise was effected, not, it is true, by the guardian ad litem, but by the natural guardian of the minor. That compromise, in my opinion, was contrary to law because in effect it defeated the purpose of S. 462.

That section, I think, necessarily implies that during the continuance of proceedings in Court, the dispute between the minor and another party which the Court had to decide could not be compromised except by the guardian ad litem of the minor, and by him only with the leave of the Court.

That, I think, is the principle and purpose underlying S. 462, and I think that a relaxation of that principle might lead to very serious abuse.

Therefore I think the appeal should be dismissed with costs.

G.P./R.K.

Appeal dismissed.

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MACLEOD, C. J. AND HEATON, J.

Atmaram Bhaskar Damle—Plaintiff—Appellant.

v.

Parashram Ballal Kelkar—Defendant—Respondent.

Second Appeal No. 878 of 1918, Decided on 26th January 1920, from decision of Ag. Dist. Judge, Ratnagiri, in Appeal No. 12 of 1918.

Civil P. C. (5 of 1908), S. 11, Explan. 5 and O. 20, R. 12—Future mesne profits claimed under R. 12 but decree silent—Fresh suit for such profits will be barred.

Rule 12, O. 20, expressly empowers a Court to make an order for future mesne profits. It is therefore permissible for a plaintiff, in a suit for partition and possession, to claim future mesne profits. But if such claim is made and the decree is silent as to future mesne profits, the relief will be taken to have been refused and a separate suit for such profits will be barred by Explan. 5, S. 11. [P 40 O 1,2]

V. C. Kelkar—for Appellant.

V. D. Limaye—for Respondent.

Macleod, C. J.—The plaintiff sued to recover on account of profits of the plaintiff lands Rs. 150 for the three years 1915, 1916 and 1917 as per decree in suit No. 35 of 1916.

There was a partition suit, in which partition was asked for and possession with a claim not only for past mesne profits, but also for future mesne profits. The decree which granted partition made no reference to future profits, although prior profits were awarded. The trial Court allowed the plaintiff's claim, say-

ing that "because the Court did not notice it, it does not follow that the plaintiff must lose future profits." This decree was reversed by the District Judge on the ground that as future profits were expressly asked for and had not been expressly granted by the decree, the case came within Explan. 5, S. 11, Civil P. C. Therefore the claim should, for the purposes of that section, be deemed to have been refused.

At first sight that would seem to be the obvious meaning of Explan. 5. But we have been referred to two decisions, one in *Doraisami Aiyar v. Subramania Aiyar* (1) and the other in *Mohammed Ishaq Khan v. Mohammed Rustum Ali Khan* (2), in which the contrary was decided. A distinction was made between a claim for past profits and a claim for future profits, because the claim for the latter would not have accrued when the suit was filed.

It was held that the word "relief" in the Explanation meant relief arising out of the cause of action which had accrued at the date of suit and on which the suit was brought, and did not include relief, such as mesne profits, accruing after the date of suit as to which no cause of action had arisen. We have not been referred to any decision of this Court on the point. No doubt there are authorities to the effect that the relief claimed must have been one which the Court was bound to grant and not one which it was discretionary with the Court to grant, but I see no logical basis in this case for such a distinction. The authorities with regard to future mesne profits which are cited by Mr. Mulla at p. 60 (5th Edn.) of his Commentary on the Civil Procedure Code of 1908 are all cases under the Code of 1882.

Granted that a claim for future profits can be made by a plaintiff, and can be granted by the Court in its decree, then it is difficult to see with all due respect to the learned Judges who decided in favour of the opposite view in the cases I have referred to why a claim for future profits, if made, cannot be considered as relief claimed in the plaint within the meaning of Explan. 5. Under the Code of 1882 the amount of mesne profits had to be determined in execution proceedings and S. 244, which dealt with

(1) [1918] 41 Mad. 188=42 I. C. 929.

(2) [1918] 40 All. 292=44 I. C. 88.

the questions which had to be decided by the Court in execution of a decree and not by a separate suit, enacted by Cl. (c), that nothing in that section should be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits were not dealt with by such decree. That is to say, I presume, in execution of such decree. Therefore it could be deduced from that clause that even if future profits were claimed, but were not dealt with by the decree, then in spite of Explan. 3 to S. 13, which corresponded to Explan. 5, S. 11 of the Code of 1908, a separate suit for future profits was not barred. That clause does not appear in O. 20, R. 12, the corresponding provision in the Code of 1908, and there must be some very cogent reason for its not having been re-enacted. That rule deals with the question what the Court may decree in a suit for the recovery of possession of immovable property. It was for the first time provided that the Court might direct an inquiry as to future profits and then a final decree would be passed in accordance with the result of such inquiry.

Now it appears to me that the last clause of S. 244 of the Code of 1882 was not re-enacted because there was no longer any necessity that the bar against multiplicity of suits provided by S. 11 should not apply to claims for future profits if made. The question whether a subsequent suit for future mesne profits would lie was decided in the affirmative under the Code of 1882 in *Sheo Kumar v. Narain Das* (3). Whether such a suit, if the claim has not been made in the fresh suit, will still lie, considering the provisions of O. 2, R. 2, and the alterations made in the Code of 1908, O. 20, R. 12, remains to be decided. On the whole I prefer to agree with the opinion expressed by Ayling J., in *Doraisami Aiyar v. Subramania Aiyar* (1), adhering to the decision of himself and Hannay, J., in *Ramasami Aiyar v. Srinagaraja Iyengar* (4). It appears to me desirable to give its plain meaning to Explan. 5, S. 11, so that in this case the plaintiff having claimed future mesne profits and the Court having in its decree said nothing with regard to the future

profits, we must take it that the Court refused to grant them.

Therefore the appeal fails and must be dismissed with costs.

Heaton, J.—The point before us relates to what happens when a plaintiff sues for redemption or possession and in his plaint claims future mesne profits and the decree is silent as to such mesne profits.

There are two views: one is that plaintiff can bring a second suit to recover the mesne profits; the other that he cannot.

The matter has been a good deal discussed and is the subject of two decisions one in *Doraisami Aiyar v. Sulramania Aiyar* (1) and the other in *Mohammed Ishaq Khan v. Mohammed Rastum Ali Khan* (2). Opinions have not been unanimous. The matter at first sight appears to be one of detail. Nevertheless it seems to me to conceal an important matter of principle. Our law provides as a matter of principle—a very important principle—that the multiplicity of suits should be discouraged; that two suits should not be brought where one will suffice. That broadly stated is the principle and it is given effect to by S. 11 of our Code of Civil Procedure. Explan. 5 to that section says:

“Any relief claimed in the plaint, which is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.”

Now in the earlier suit this relief of future mesne profits was expressly claimed. It was not granted and therefore apparently it must be deemed to have been refused, and if it is so deemed to have been refused, then the present suit clearly will not lie.

Rule 12, O. 20, expressly empowers a Court to make an order for future mesne profits. What the Court may do, the litigant can properly ask the Court to do. It is therefore quite in order for the litigant to ask in his plaint for future mesne profits. It seems to me that if he does so, then it is his business to obtain an order of the Court or an adjudication of the Court on that matter which he himself has expressly brought into his plaint. If it is overlooked by the Court, then it is the litigant's business to remind the Court of its oversight and to have it corrected, or to appeal against the decree which is silent as to this matter which

(3) [1902] 24 All. 501=(1902) A. W. N. 139.

(4) [1915] 26 I. C. 622.

the plaintiff has asked to have decided. It seems to me therefore that the matter is typically of the kind to which our general principle embodied in S. 11 of the Code is intended to apply. My Lord the Chief Justice has pointed out that under the old Code there was a different provision, that there was a reason then, arising out of specific words appearing in S. 214 of that Code for holding that a second suit for future mesne profits would lie. That exception to a very important general principle no longer appears in our present Code, and it seems to me therefore to be incumbent on us to apply the general principle.

I think therefore that this appeal fails and must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 41

SHAH AND HAYWARD, JJ.

Amrit Vaman Inamdar—Plaintiff—Appellant.

v.

Hari Govind Kulkarni—Defendant—Respondent.

Second Appeal No. 830 of 1917, Decided on 9th September 1919, from decision of Asst. Judge, Belgaum, in Appeal No. 253 of 1914.

(a) *Bombay Hereditary Offices Act* (3 of 1874), S. 15—Whole village mentioned in sanad—Burden of proof that certain survey numbers are excluded is on person alleging it.

Where a sanad evidencing a settlement under S. 15 mentions a whole village, a party who alleges that a particular survey number of that village is outside the scope of the settlement must prove his allegation. [P 44 C 2]

(b) *Grant—Inams and Saranjams*—Ordinary presumption is of grant of revenue in absence of indication of grant of soil—*Bombay Hereditary Offices Act* (1874), S. 15.

In the case of inams and saranjams in the Bombay Presidency the ordinary presumption in respect of such a settlement under S. 15, *Bombay Hereditary Offices Act*, is in favour of the grant being limited to the royal share of the revenue in the absence of any words to indicate a grant of the soil, but the absence of such words would not necessarily establish that the grant is of the royal share of the revenue only. [P 45 C 1]

Jayakar and K. H. Kelkar—for Appellant.

Dhurandhar, D. R. Manerikar and H. G. Kulkarni—for Respondent.

Shah, J.—The plaintiff in this case sued to recover possession of a part of Survey No. 45 in the village of Rajgoli Khurd with Rs. 100 as profits for one year from defendant 1 and his tenants. He alleged that the property was watan

property, and that the alienation thereof effected by his father in favour of defendant 1 was not valid beyond his lifetime under S. 5, *Bombay Hereditary Offices Act*, that his father died in January 1912, and that he was entitled to the possession of the land.

Defendant 1 resisted the claim on the ground that under the decree on an award in Suit No. 253 of 1910 obtained by him against the plaintiff's father, he was entitled to retain possession of the land in suit until the Shaka year 1852 (1930-31 A. D.), that it was not watan property and that the plaintiff's father had authority to effect the alienation in his favour.

The trial Court found that the property was watan property and that the plaintiff's father had no power to alienate it beyond the term of his natural life. It passed a decree in favour of the plaintiff for possession and mesne profits.

The defendant appealed to the District Court and the learned Assistant Judge who heard the appeal found that the original grant was not a grant of the soil but merely of the royal share of the revenue of the village, and that there was nothing to show that the land in suit was not held by the original inamdar at the time of his grant as his private property. Accordingly he allowed the appeal and dismissed the plaintiff's suit with costs.

The plaintiff has appealed to this Court and it is urged in support of the appeal that the conclusions reached by the lower appellate Court are erroneous. In order to appreciate the rival contentions of the parties in this appeal it is necessary to state briefly the history of the grant of the village of Rajgoli Khurd of which the land in suit forms a part.

The earliest document relating to the grant of this village is the order issued by the then Maratha ruler, Shambhu Chatrapati, to the Mukadam of Mouje Rajgoli Budruk and Mouje Rajgoli Khurd in the year 1734 A. D. The grant is in these terms:

"The respected Virupakshara Yamaji of Gotra Gautama, who is the most devoted servant of the Swami (King), has been rendering service (to the Swami), with singleness of purpose and therefore, it is necessary for the Swami to provide for his maintenance by the grant of an inam to him. Therefore the Swami is now graciously pleased to grant to him as new inam the whole of the aforesaid two villages Koolbab and Koolkance (i. e., all taxes and assessments)

but exclusive of the (haks of) hakdars and inamdars. You should therefore acting in obedience to this order continue the said inam to him, his sons, grandsons and so on from generation to generation."

The material words in Marathi are :

"*Nutan inam koolbab koolkanoo kherij hakdar wa inamdar karun sadarhu donhi ganv darobasta inam dilhe ast.*"

Some years later in a letter written by Balaji Bajirao Pradhan the grant is referred to in the same terms, and there is a command that the entire amal of the two villages should be continued as Inam hereditarily according to the King's letter, the Marathi word for "entire" being 'darobasta.' In 1858 the Inam Commissioner examined the history of this grant and decided under Act 11 of 1852 as follows:

Whereas in the Zilla of Belgaum certain lands and cash allowances are entered in the Government accounts of the year 1862-63 as held on service tenure as follows:—

Name of the Watan	Lands assessed at	Cash allowances	Total emoluments (after deducting Mamool Joodee)
Mootalik Desai.	Rs. 1,189-4-7	Rs. 20-8-0	Rs. 1,209-12-7

and whereas the holders thereof have agreed to pay to Government a fixed annual payment in lieu of service:—

It is hereby declared, that the said lands and cash allowances shall be continued hereditarily by the British Government on the following conditions; that is to say, that the said holders and their heirs shall continue faithful subjects of the British Government, and shall render to the same the following fixed yearly dues:

	Rs.	a.	p.
Mamool Joodee
in lieu of service
	230	11	0
Total
	230	11	0

	Rs.	a.	p.
at 5 annas in the Rupee	9	18	0
at 3 annas in the Rupee	220	14	0

Two hundred and thirty and annas eleven only.

In consideration of fulfilment of which conditions :

1st—The said lands and cash allowances shall be continued without demand of service and without increase of land tax over the above fixed amounts, and without objection or question on the part of Government as to the rights of any holders thereof so long as any male heir to the watan, lineal collateral, or adopted within the limits of the watandar family, shall be in existence,

2nd—No Nuzzerana or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral, or adopted within limits of the watandar family, and permission to make such adoptions need not hereafter be obtained from Government.

3rd—When all the sharers of the watan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the watan, on the payment from that time forward in perpetuity of an annual Nuzzerana of one anna in each rupee of the above total emoluments of the watan.

DETAILS OF LANDS AND CASH ALLOWANCES.

Name of the Taluka.	Name of the Village	Lands to continue (as Watan)			Cash allow-ances.	Total Rupees	Mamool Joodee Rupees
		Nos. of the Fields	Acres	Revenue Assess-ment			
Bel-gaum	Those about which there is a Tharao (Settlement) Inam Committee Resolu-tion No. 8101, dated 30th April 1858 A D., in respect of the whole village. Mouje Rajgoli Khurd.			<p><i>J. N. D.</i> Advocate High Court Jammu & Kashmir Srinagar.</p>			On the gross income watan settlement jodi at 3 annas in the rupee amounting to Rs. 138-6-0.

This settlement is on the lines of the Gordon Settlement; and the lands including the village of Rajgoli Khurd are assigned on certain terms in lieu of service. There is no provision in the sanad giving to the watandar any right to alienate the watan beyond his lifetime, and the watan is mentioned as the Mutalik Desai Watan. There are other documents of minor importance which need not be referred to.

In 1910 defendant 1 obtained a decree on an award against the plaintiff's father for a certain claim and the possession of the land in suit, which is referred to in the decree as watan land, was to be retained by the defendant for a certain number of years. The terms of this decree have not been referred to in detail in the argument before us. But the decree is accepted by both the parties as effecting an alienation by the plaintiff's father for a certain number of years. The land in suit forms part of the village lands.

It is clear from these facts that the settlement effected in 1884 is referable to S. 15, Bombay Hereditary Offices Act, and is binding upon the parties. According to that settlement the village of Rajgoli Khurd is watan property. Under S. 5 of the Act no watandar can mortgage, charge, alienate or lease for a period beyond the term for his natural life any watan or any part there.

of to any person who is not a watan-
dar of the same watan without the
sanction of Government and this pro-
vision applies to any watan in respect
of which a service commutation set-
tlement has been effected under S. 15
of the Act, unless the right of alienating
the watan without the sanction of Gov-
ernment is conferred upon the watan-
dars by the terms of the settlement.
Defendant 1 is not a watandar of the
same watan and no such right of aliena-
tion has been conferred by the terms of
the settlement. The sanad in this case
is in the usual form adapted to the
Gordon Settlement and it is clear on
the terms of the section as also on the
decisions of this Court relating to the
Gordon Settlement in *Appai Bapuri v.*
Keshav Shamrao (1) and *Bhau v. Ram-*
chandraro (2), that in the absence of a
sanction of the Government any aliena-
tion of the watan property beyond the
term of the watandar's natural life is
inoperative. The village of Rajgoli
Khurd is watan property having regard
to the definitions of "watan property"
and "hereditary office" in the Bombay
Hereditary Offices Act. If the land in
question forms part of the watan pro-
perty the alienation thereof could not

(1) [1891] 15 Bom. 18.

(2) [1896] 20 Bom. 423.

be valid after the death of the plaintiff's father.

For the plaintiff it is urged that the burden of showing that the land in suit is not a part of the watan property is on the defendant, that he has failed to discharge that burden, that the distinction between a grant of the royal share of the revenue and a grant of the soil which is recognized in this Presidency with reference to inams and saranjams cannot be and has never been extended to watans and that the presumption in favour of a grant being limited to the royal share of the revenue even in the case of inams and saranjams cannot be made in view of the observations of their Lordships of the Privy Council in *Suryanarayana v. Patanna* (3). Further it is contended that on the terms of the grant in this case it ought to be held that the grant was of the soil and not merely of the royal share of the revenue of the village.

It is urged for the defendant that the plaintiff has failed to show that the land in suit forms part of the watan property, that the watan property here only means the royal share of the revenue and not the soil of the village of Rajgoli Khurd according to the terms of the sanad, that even according to the terms of the original grant confirmed by the Inam Commissioner it is limited to the royal share of the revenue and does not extend to the soil and that this distinction is well recognized in this Presidency and ought to be accepted in this case in spite of the decision in *Suryanarayan's case* (3).

In the absence of any clear proof that the occupancy right in the survey number in suit was vested in the plaintiff's ancestor independently of the grant and that the land in suit was outside the lands dealt with in the settlement of 1884 I think that it must be held to be watan property like the village itself. "Watan property" according to the Act, means moveable and immovable property held, acquired or assigned for providing remuneration for the performance of the duty appertaining to an "hereditary office," which expression includes such office even where the services originally appertaining to it have ceased to be demanded. It is difficult

to treat the village mentioned in the sanad as referring to the royal share of the revenue only. The sanad refers to the lands and where the whole village is referred to, the lands of the village are not referred to in detail by their survey numbers. Thus where the whole village is mentioned in a sanad evidencing a settlement under S. 15, Bombay Hereditary Offices Act, it is for the party alleging that a particular survey number of that village is outside the scope of the settlement to prove it. In the present case there is no such evidence. The lower appellate Court observes that there is nothing on the record to show that the land in dispute was not held by the original inamdar as his private property at the date of the first grant. But at the same time there is nothing to show that it was so held. No document is referred to before us as showing that the survey number in question was held at any time otherwise than as part of the watan property. This conclusion is strengthened by the fact that in the decree in the suit of 1910 it is described as watan land. In the case of watan property the distinction between grants of the royal share of the revenue and grants of the soil, which is admissible in the case of inams and saranjams, cannot be conveniently made without detriment to the statutory restriction on the watandar's power of alienation and should not be made unless it is clearly justified by the terms of the settlement. The statutory restriction would be limited in its scope if such a distinction were made. The terms of the sanad in the present case do not justify such a construction of the grant under the settlement of 1884. I do not say that such a distinction can never be made in the case of watans. It is sufficient for the purpose of this case to observe that no basis for such a distinction has been made out on the terms of the settlement of 1884 with reference to the land in suit.

So far my conclusion is based upon the terms of the sanad of 1884, and is independent of the terms of the grant in 1734 as confirmed in 1858 by the Inam Commissioner. It is by no means clear on the terms of the original grant of 1734 that it is limited to the royal share of the revenue. It is quite true, as contended by the defendant, that in this

(3) A. I. R. 1918 P. C. 169=41 Mad. 1012=48 I. C. 689=45 I. A. 209 (P. C.).

Presidency in the case of inams and saranjams the ordinary presumption, in the absence of any indication to the contrary, is in favour of the grant being limited to the royal share of the revenue and that clear words are necessary to indicate a grant of the soil: see *Krishnarav Ganesh v. Rangrav* (4), *Ramchandra v. Venkatarao* (5), *Rajya v. Balakrishna Gangadhar* (6). It is also true that the words ordinarily used to indicate a grant of the soil are "water, grass, wood (trees), stones, mines and hidden treasures", as pointed out in *Ravinarayan v. Dadaji Bapuji* (7), *Collector of Ratnagiri v. Antaji Lakshman* (8) and *Balvant Ramchandra v. Secy. of State* (9). But the absence of these words cannot be treated as necessarily establishing that the grant is of the royal share of the revenue only. There is no decision which has gone so far as to lay down that no other expression can indicate a grant of the soil.

Assuming that the nature of the settlement in 1884 must be determined with reference to the terms of the original grants as confirmed by the Inam Commissioner, it is not a matter of presumption but a question of the construction of the words actually used. It is clear from the reference to S. 2, Appx. 2 (Sch. B), Act 11 of 1852, in the decision of the Inam Commissioner that the inam was then continued according to the terms of the old grant of 1734 A. D. Thus though the word "darobasta" is not used in the decision of the Inam Commissioner it seems to me that by implication the grant is continued on the same terms as the old grant and that in effect the expression used by the Commissioner must be taken to be the expression used in the grant of 1734 A. D. That expression is by no means clear on the question as to whether the grant was only of the royal share of the revenue or of the soil also; and apart from authority I should have found it difficult to construe it as a grant of the soil. The difficulty is increased by the consideration that the usual words (*jala, taru, trina, pashana, nidhi, nikshepa*) indicating a grant of the soil are not used. I find it however difficult to

distinguish the grant in the present case from the grant which was construed by this Court in *Vasudev Pandit v. Collector of Puna* (10). I think that we ought to follow this decision and hold that the grant in this case was a grant of the soil and not merely of the royal share of the revenue. The present case cannot be reasonably distinguished on the ground that the word "darobasta" is not used by the Inam Commissioner in his decision.

I do not say that the use of the word "darobasta" would necessarily indicate a grant of the soil. In the case of *Vaman Janardan Joshi v. Collector of Thana* (11) the grant was held to be limited to the royal share of the revenue. In that case however there was a clause to the effect that

"the village should be continued to him as an inam grant and the revenue of the said village, including that of Kasba Chauk should be entered in the taluka account to the debit of the Joshi, on account of inam."

In the present case we have no such clause. It is not easy to reconcile all the observations in this case with the decision in *Vasudev's* case (10). But there is no necessary conflict between the two decisions. On the best consideration that I can give to the question, I think that on the terms used in the grant of 1734 and confirmed by the Inam Commissioner in 1858, the grant is of the soil as in *Vasudev's* case (10).

In this view of the matter, it is not necessary to consider the effect of the observations of their Lordships of the Privy Council in *Suryanarayana's* case (3), relied upon by the plaintiff as to the presumption made in this Presidency in favour of a grant being of the royal share of the revenue in the absence of any indication that the grant is of the soil, in the case of inams and saranjams. In a somewhat similar case their Lordships have referred to these observations and have pointed out that each case must be considered on its own facts and that in order to ascertain the effect of the grant resort must be had to the terms of the grant itself and to the whole circumstances so far as they could be ascertained: see *Upadrashtha Venkata Sastrulu v. Divi Seetharamudu* (12). Both these cases were cases of ancient

(4) [1866-67] 4 B. H. C. R. (A. C. J.) 1.

(5) [1881-82] 6 Bom. 593.

(6) [1905] 29 Bom. 415.

(7) [1876-77] 1 Bom. 523.

(8) [1898] 12 Bom. 584.

(9) [1905] 29 Bom. 480.

(10) [1879] 10 B. H. C. R. 471.

(11) [1869] 6 B. H. C. R. (A. C. J.) 191.

(12) A. I. R. 1919 P. O. 111=48 Mad. 166=45 I. A. 123=51 I. O. 304 (P. O.).

Agrahara grants; and the considerations applicable to Agrahara grants are naturally different from those applicable to secular grants or service. The question whether these decisions of the Privy Council require that no presumption that a grant is of the royal share of the revenue can be made where there is nothing to indicate that the grant is of the soil, is one of great practical importance; and it will have to be decided hereafter, when it arises.

As the point is argued I do not consider it inappropriate to point out the difficulties in the way of interpreting the observations of their Lordships of the Privy Council in the manner suggested by the plaintiff without expressing any opinion on the point. The presumption is made in this Presidency in favour of a limited grant of the royal share of the revenue in the absence of any words to indicate a grant of the soil, not because the Courts have felt any doubt as to the power of the rulers to make a complete grant of the land, but because the grants by the Crown must be construed strictly so that nothing more may be deemed to have been conveyed than what appears clearly from the words of the grant, and because suitable words are generally used when a complete grant of the soil is intended. This presumption may be only another form of stating the rule that the Crown grants should be construed according to their tenor as stated in S. 2, Crown Grants Act 15 of 1895. The history of the inams in this Presidency and the words in the preamble of Act 11 of 1852, showing that the Act was passed with a view to try and determine without delay the claims against Government on account of inams and other estates wholly or partially exempt from the payment of land revenue, may go to indicate that the grant might be merely of the royal share of the revenue and of nothing more. The meaning of the word "re-sumption" under that Act, as explained by the Government in 1854 and accepted by this Court in *Vishnu Trimbak v. Tatia* (13), and in many other later decisions both as to inams and saranjams, may also show that there are many grants merely of the royal share of the revenue. The observations of their Lord-

ships of the Privy Council in the above cases may not be irreconcilable with the decisions of this Court, in which it is pointed out that in the absence of any words indicating a grant of the soil, a grant by the Crown must be taken to be a grant of the royal share of the revenue only.

I would allow the appeal, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court on defendant 1.

I would make the same order in Second Appeal No. 829 of 1917.

Hayward, J.—I agree. It is simply a question of interpreting the deeds of grant, which include two from the time of the Maratha rulers and the sanad under the Gordon Settlement from the British Government. There is, in my opinion, no sufficient ground for holding the grant to have been merely a grant of the royal share of the revenue and not a grant of the soil. It is similar to the case of *Vasudeo Pandit v. Collector of Puna* (10). It is of course, necessary in interpreting such grants to remember what words were in ordinary use at the time for distinguishing between grants of the royal share of the revenue only and for grants of the soil, but it has also to be remembered that this was a grant for service or a watan grant and not an ordinary inam or saranjam grant. There is no authority excluding from consideration these matters. It was merely held that there was not a prior presumption that grants were limited to the royal share of the revenue and were not of the soil in the case of *Suryanarayana v. Patanna* (3) by their Lordships of the Privy Council.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 46

MACLEOD, C. J. AND HEATON, J.

Nilkanth Bhimaji Sinde — Plaintiff—Appellant.

v.

Hanmant Eknath Sinde and others — Defendants—Respondents.

Second Appeal No. 682 of 1918, Decided on 25th January 1920, from decision of Asst. Judge, Belgaum, in Appeal No. 10 of 1917.

Registration Act (16 of 1908), Ss. 17 and 49—Suit to recover share — Receipts of property falling to share of each and signed by

sharers—Taken together the receipts constitute instrument of partition and therefore inadmissible if unregistered — But taken singly they do not prove partition.

In a suit to recover property which had fallen to the plaintiff's share on partition, the plaintiff sought to put in evidence four receipts signed by himself and his three brothers, in which they acknowledged having accepted certain portions detailed in the respective receipts of the family property :

Held : (1) that taken together and read as a whole, the receipts constituted an instrument of partition and not being registered, were inadmissible in evidence ;

(2) that taken merely as lists of property which had fallen to each brother's share, they did not by themselves prove the fact of partition ;

(3) that in either case partition was not established and plaintiff's suit must be dismissed.

[P 48 C 1]

Bhulabhai Desai and Nilkanth Atmaram—for Appellant.

S. R. Bakhale and D. R. Gupte — for Respondent.

Macleod, C. J.—The pedigree of the parties in this suit is set out at p. 7. The property in suit originally belonged to two brothers, Bhimaji and Jiwaji, who were separate, although this particular property had not been divided by metes and bounds.

It is admitted that Jiwaji's branch has an eight annas share in the suit property. Nilkanth, one of the sons of Bhimaji, claims to be entitled to the other half against his brothers, alleging that at a partition between the sons of Bhimaji the half share in the plaint lands was given to his share. It appears that the family had property not only in British India, but also in Kolhapur. An arbitrator was appointed for partition of the family property. He issued an award partitioning the property in Kolhapur, but there is no record as to whether a partition was made of the property in British India. In 1900 the four brothers signed receipts in which they acknowledged having accepted certain portions detailed in the respective receipts of the family property. The plaintiff in 1915 filed this suit against the children of his brothers to obtain his half share in the suit property. He also joined the sons of Jiwaji.

The trial Court declared that he was the owner of a half share in the plaint property. In appeal this decree was set aside on the ground that

"these receipts constitute an instrument of partition and in so far as they relate to the pro-

perty in British India, they required registration, and therefore not being registered, they are inadmissible in evidence."

We have been referred to the decision of the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli* (1). There there had been a compromise which purported to extinguish the equity of redemption in certain property. That was not registered, but a decree was passed in the suit between the parties which recognized the compromise. For 30 years the compromise had been acted upon as was proved by the evidence, and I think their Lordships, in holding that the right to redeem the mortgage was extinguished, arrived at their conclusion, not on the deed of compromise which was unregistered, but on the evidence of what had occurred since the compromise was executed. Having found that the parties had acted under the terms of the compromise for 30 years, they considered that as evidence of what had been done, so that the terms of the compromise were proved not by the document itself but by the actions of the parties after it had been executed. Now if in this case it had been proved that the four brothers since 1900 had been in separate occupation of the various properties detailed in the four receipts up to the date of the suit. I think that might well be taken as evidence that there had been a partition in 1900 and the Court would have come to the conclusion that there had been a partition, without referring to the receipts. But in this case the plaintiff seeks to prove the partition by the evidence of the receipts themselves, and except that there seems to be some evidence that the plaintiff had been in possession of the plaint property until 1903, there is no evidence in the case that in other respects these four brothers acted in conformity with the alleged partition.

I think therefore that the Assistant Judge was right in coming to the conclusion that these four documents required registration and were therefore inadmissible in evidence, and that the rest of the record was not sufficient to prove that a partition had taken place. I think therefore the appeal must be dismissed with costs to respondents 1, 2, and 6.

Heaton, J.—I also think the appeal must be dismissed with costs.

(1) A.I.R. 1914 P.O. 27=42 Cal. 801=42 I.A. 1=28 I.O. 930 (P.O.).

I make one preliminary remark. I feel quite certain that their Lordships of the Privy Council in giving judgment in *Mahomed Musa's* case (1) did not intend either to modify or to limit that part of the enactments of the Indian Legislature which appears as Ss. 17 and 49, Registration Act, nor do I believe that the Privy Council ever have intended by their judgments to modify or limit that which has been enacted by the legislature in India. So the effect of Ss. 17 and 49, Registration Act, remains as totally unaffected as before, by anything that is said in the case of *Mahomed Musa v. Aghore Kumar Ganguli* (1).

Now the four documents with which we are concerned may be looked at in two ways: They may be taken together and read together as one whole. In that case they constitute an instrument of partition and would be totally ineffectual, because they were not registered. In another way they may be looked at as four individual lists of property, each one signed by one of the four sharers, made after the partition had been effected and made merely to indicate as a matter of mutual convenience what share had fallen to each sharer. If that is the true nature of the documents, they might be of very great importance for the purpose of corroborating or contradicting what witnesses might depose to. They would be useful also as establishing the fact that it was probably understood at the time that particular lands had fallen to particular persons; but they would not in themselves prove a partition. That would have to be done by somebody who had personal knowledge of the partition. So that we are left in this position. If it is sought to prove the fact of the partition by these documents, that cannot be done, because the law of registration prevents it. If it is sought to use them in any other way, they can only be used as subsidiary papers and are of no use whatever, until there is evidence altogether outside them, that the partition was made and was given effect to in some such way as these papers suggest. But that is not proved in this case.

I think therefore, as I began by saying, that the appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 48

SHAH AND CRUMP, JJ.

Krishnaji Sakharam Deshpande—Defendant—Appellant.

v.

Kashim Mohiddinsaheb Havaladar and another—Plaintiffs—Respondents.

Second Appeal No. 233 of 1917, Decided on 24th November 1919, from decision of Asst. Judge, Belgaum, in Appeal No. 339 of 1915.

Bombay Hereditary Offices Act (3 of 1874), S. 5—Mortgage with possession of vatan lands—Suit for possession or redemption by heirs of mortgagor within 12 years of his death decreed—On dispossession after 12 years after mortgagor's death mortgagee's son sued for mortgage money—Suit not being within six years of date stipulated for payment held barred—Further S. 20 (2), Lim. Act, did not apply—Limitation Act (9 of 1908), S. 20 (2).

On 6th May 1893 S mortgaged certain vatan lands with possession. The mortgage was for 12 years. In 1901 the mortgagor died and in 1913 his son sued to recover possession of the land and in the alternative for redemption. In 1914 he obtained a decree for possession and mesne profits, and in the same year the heirs of the mortgagee brought the present suit to recover the mortgage money with interest. The trial Court dismissed the claim as barred by time, but the appellate Court decreed the claim holding that possession was first taken from the plaintiffs in 1914 and that the cause of action arose at the date of dispossession, and that the claim was in time. On second appeal:

Held: (1) that under the mortgage-deed the money was payable in 12 years from the date thereof and that the suit not having been instituted within six years from the expiry of the 12 years mentioned therein, it was time-barred;

(2) that S. 20 (2), Lim. Act, did not save the suit, as that section had no application because under S. 5, Bombay Hereditary Offices Act, the mortgage was operative only during the lifetime of the mortgagor and on his death the possession of the original mortgagee was that of a trespasser claiming a limited interest in the mortgaged property as mortgagee, but not the possession of a mortgagee. [P 49 C 2]

S. S. Patkar and D. R. Manerikar—for Appellant.

Jayakar and S. G. Desai—for Respondents.

Judgment.—The facts which have given rise to this second appeal are these:

On 6th May 1893 the present defendant's father passed a possessory mortgage for Rs. 2,000 in favour of the plaintiffs' predecessor-in-title. The mortgage related to vatan property. On 8th April 1901 the defendant's father died. The present defendant filed Suit No. 106 of 1913 to recover possession of the land and in the alternative for redemption of the mortgage. In April 1914, a decree

was passed in favour of the plaintiffs in that suit awarding them possession with mesne profits for three years. The present suit was filed by the heirs of the mortgagee to recover Rs. 3,000 (Rs. 2,000 as principal and Rs. 1,000 as interest) on 2nd June 1914.

The trial Court held that the money claim was barred by limitation and dismissed the suit. In appeal the lower appellate Court came to the conclusion that the possession was in fact taken from the plaintiffs in 1914, that under the covenant the cause of action arose at the date of dispossession, and that the claim was within time. In the result the plaintiffs' claim was allowed.

The defendant has appealed to the Court, and it is urged in support of this appeal that the plaintiffs' claim is time barred and that the point relied upon by the plaintiffs relating to the covenant in the deed is res judicata in virtue of the decision in Suit No. 106 of 1913.

In the view which we take of the point of limitation urged in this appeal it is not necessary to express any opinion as to the point of res judicata raised on behalf of the defendant.

Apart from the effect of the covenant to which we shall presently refer, it is clear that under the document the money was payable in twelve years from the date of the document and that the suit not having been filed within six years from the expiry of the twelve years mentioned in the deed, it is time barred. The covenant relied upon by the plaintiffs runs as follows:

"If there be any dispute about the land on the part of the bhaubands or of anybody else, I shall settle the same. If there be any hindrance to continuance of the land, I shall pay the said sum together with interest thereon at the rate of 1 per cent per mensem out of my other estate and personally in the year in which the hindrance may arise."

The lower appellate Court has construed this covenant as meaning that the mortgagor undertook to pay the amount in the year in which the hindrance would arise, and as the hindrance arose when the possession was disturbed, the liability to pay under this covenant arose at the date of the hindrance. It seems to us however that on a proper construction of this covenant it really means that the mortgagor undertook personally to pay the amount if any hindrance was caused to the possession during his lifetime.

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The mortgaged property being vatan land the mortgage could have operation only during the life of the mortgagor. Under S. 5, Bombay Hereditary Offices Act, it is not competent to a vatandar, without the sanction of Government, to mortgage for a period beyond the term of his natural life any vatan property to any person who is not a vatandar of the same vatan. It is not disputed now—and in fact it has been held in the suit of 1913—that this mortgage was operative only during the lifetime of the mortgagor according to law. It is clear from the reasoning in *Parshottam Veribhai v. Chhatrasangji Madhavasangji* (1) that the parties must be taken to have contracted with reference to the existing law. Reading the covenant in that light, the mortgagor must be taken to have agreed to pay the amount personally if any hindrance were caused during his lifetime. The covenant does not refer in terms to his heirs and successors. The mortgage as such came to an end on the death of the mortgagor, and the purpose of the covenant was fulfilled when no hindrance was in fact caused during the lifetime of the mortgagor. We are therefore of opinion that the date of the subsequent dispossession or the hindrance caused to the enjoyment of the property after the date of the mortgagor has nothing to do with the question of limitation, and that the time against the plaintiffs cannot be taken to commence to run from the date of such hindrance.

It is urged on behalf of the respondents that in any case the suit is saved under S. 20, sub-S. 2, Lim. Act, which provides that

"where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-S. 1."

It is clear that after the death of the mortgagor in the present case the possession of the original mortgagee was the possession of a trespasser claiming a limited interest in the property as a mortgagee, but not the possession of a mortgagee. Within twelve years from the death of the mortgagor the person entitled to the property put forward effectively a claim to this property against him, and in our opinion, on the facts of this case, sub-S. 2, S. 20, has no application. The plaintiffs' claim therefore is clearly time barred.

(1) [1917] 41 Bom. 546=10 I. O. 1002.

The result therefore is that we allow the appeal, reverse the decree of the lower appellate Court, and restore that of the trial Court with costs of this appeal and in the lower appellate Court on the plaintiffs.

The cross-objections are dismissed with costs.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 50

MACLEAD, C. J. AND HEATON, J.

Anna Laticia De Silva—Plaintiff—Appellant.

v.

Govind Balwant Parashare—Defendant—Respondent.

Second Appeal No. 962 of 1918, Decided on 27th January 1920, from decision of Dist. Judge, Thana, in Appeal No. 342 of 1917.

Civil P. C. (5 of 1908), Ss. 2 (17) and 80—Receiver in insolvency proceedings is a public officer—Notice under S. 80 is essential before suit against him.

A receiver appointed under the provisions of the Provincial Insolvency Act is a public officer within the meaning of S. 2, Cl. (17), and before an action can be brought against him notice must be served upon him in conformity with the requirements of S. 80, Civil P. C.

[P 50 C 2]

Rangnekar and *W. B. Pradhan*—for Appellant.

Macleod, C. J.—The plaintiff brought this suit against the defendant, who had been appointed a receiver in an insolvency application No. 13 of 1915 in the Thana District Court, to get it declared that the property in suit belonged to her. The suit was decreed in the trial Court, but was dismissed on appeal on the ground that notice under S. 80, Civil P. C., has not been given. Instead of giving notice, and then filing a fresh suit if her demand was not complied with, the plaintiff filed a second appeal, and the question now before us is whether a receiver under the Provincial Insolvency Act is a public officer within the meaning of S. 2, sub-S. (17), Civil P. C. The defendant is not an Official Receiver under S. 10 of the Act, and so an officer of the Court whose duty it is to take action on every adjudication. He is merely a person specially authorized in this particular insolvency to act as receiver. S. 20, Provincial Insolvency Act, states what are the duties and powers of a receiver :

"Subject to the provisions of this Act, the receiver shall, with all convenient speed, realize the property of the debtor, and distribute dividends among the creditors entitled thereto, and for that purpose may (a) sell all or any part of the property of the insolvent; (b) give receipts for any money received by him; and may, by leave of the Court, do all or any of the things" defined in the remaining part of the section.

It has been urged that because such a receiver is merely appointed receiver by the Court, he is not specially authorized by the Court to take charge or dispose of any property and that his powers to do so arise, not from the order of the Court, but from S. 20 of the Act. But it appears to me that the powers under S. 20 given to a receiver are in effect given by the order of the Court which appoints him receiver. It is a necessary consequence of the order. Therefore it may well be said that the Court especially authorized him to take charge or dispose of the particular insolvent's property. It is only on account of the provisions of S. 20 that the general powers need not be entered in the order appointing a receiver. When special powers are asked for, then special leave of the Court is required. General powers arise by the mere appointment by the Court. It seems to me, then, as soon as a receiver is appointed under the Provincial Insolvency Act, he becomes a public officer and he is protected by S. 20 against any plaintiff who files a suit against him with regard to any act done by him as such receiver without giving the requisite notice. The decision therefore in my opinion of the lower appellate Court was correct, and the appeal must be dismissed. No order as to costs.

Heaton, J.—I think that must be the order in this case. As the result of argument the thing has filtered down to this: that if the receiver is a public officer within the meaning of S. 80, Civil P. C., then a notice as provided by that section must be served on him or the suit must be dismissed. Whether he is a public officer or not depends upon the definition of that term in Cl. (17), S. 2, Civil P. C., and he is undoubtedly a public officer if he is a person especially authorized by a Court of justice to take charge or dispose of any property. Now there is no doubt that a receiver, at any rate, this particular receiver we are concerned

with, was appointed by a Court of justice as receiver, that is to say, he was authorized by a Court of justice. And as a receiver he was authorized by the Court to do those things which a receiver may do under the provisions of the Provincial Insolvency Act, for otherwise he would not have been appointed a receiver.

The argument urged by the appellant comes to this: that although all this may be so, the receiver was not especially authorized by the Court. It is urged that the especial authorization is not contained in the order of the Court, but follows only from the provisions of the Provincial Insolvency Act. As a matter of fact we do not know what the order of the Court was. It is not on the record, and we have been spending our time over an ingenious argument as to the meaning of a document which nobody in Court has ever seen. It frequently happens, but, of course, it is not very enlightening. I will however assume that the Court did not say in its order that it appointed a receiver to take charge of or to dispose of the property of the insolvent. If it had said either of those things, it would undoubtedly have especially authorized the receiver to take charge of the property, or to dispose of it. I will assume that the Court said nothing more than this: "I appoint so and so to be the receiver," leaving everything else, even the name of the insolvent, to be inferred. Of course the latter would appear in the title of the proceedings. So it would very properly be inferred that the receiver was to deal with the property of that particular person. The powers conferred by the Provincial Insolvency Act would be inferred also, and so it comes to this: if the Judge adopts the brief method of expressing his order, that I have assumed, then the receiver is not especially authorized by the Court. If he makes a longer order, writes another dozen or two dozen words saying specifically that the receiver was to take charge of the property and to dispose of it, then the receiver is especially authorized. Now, for the purposes of the Provincial Insolvency Act it is really superfluous to add these extra dozen or so words. In either event the position and powers of the receiver are the same; there is not a hair's breadth of difference. I cannot suppose that the

legislature, curious as its vagaries are sometimes supposed to be, really intended that if a Judge made a brief order of the kind I have described, a notice under S. 80 would not be necessary; whereas if he made his order a little longer in words, but in no way different in effect, such notice would be necessary. Undoubtedly it would be necessary in the case of the longer order, as the order would in terms especially authorize the receiver to take charge of the property. I cannot suppose that the necessity for the notice is got rid of because the Judge happens to adopt a somewhat briefer form of expressing himself.

Macleod, C. J.—The appeal having been dismissed, I will add this: the plaintiff on the findings of both the lower Courts ought to succeed on the merits. We are told that another person has been appointed now as receiver of the insolvent's property and we think that he ought to seriously consider the findings of fact against him and seek for directions from the District Judge or the Judge, who appointed him as receiver in charge of the insolvency, as to whether he should not return the plaintiff's property to the plaintiff and so avoid the filing of another suit. No order as to costs.

Heaton, J.—I concur.

G.P./R.K.

Appeal dismissed.

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SHAH AND CRUMP, JJ.

Laxminarayan Seshagiri Haldipur—Appellant.

v.

Parvatibai Parmeshvar Mudbiri—Respondent.

Civil Extra Appln. No. 269 of 1919, Decided on 8th December 1919, from order of District Judge, Kanara, in Misc. Appln. No. 2 of 1919.

Guardians and Wards Act (8 of 1890), Ss. 12, 43 and 47—Pending appointment of guardian order sanctioning minor's marriage does not fall under S. 12 and is not appealable.

During the pendency of applications for the appointment of a guardian of a minor girl, the District Judge made an order sanctioning her marriage:

Held: that as such an order did not fall within the scope of S. 12, the District Judge had no jurisdiction to make the order and that as the order did not fall under S. 48 of the Act, it was not appealable under S. 47. [P 52 O 2]

*G. P. Murdeshwar—*for Appellant.

*Nilkanth Atmaram—*for Respondent.

Judgment.—In this case an application was made by Parvatibai to be appointed a guardian of the person of the minor Sagunabai on 14th December 1918. We are not concerned with the previous appointment of the guardian of the person of this minor. At this time there was a guardian of the property of the minor, but there was no guardian of the person of the minor. On that very day the District Judge made an order under S. 12, Guardians and Wards Act, with the consent of both the parties that

"the grandmother, in whose custody the girl must for the time being remain, do give security in Rs. 1,000 that the girl will not be married without the permission of the Court first had."

Subsequently an application was made by Laxminarayan to be appointed a guardian of the person of this minor, and we are informed by the pleaders appearing in this case that both these applications are pending, and no order has still been made appointing any person as guardian of the person of the minor. On 22nd February last a proposal was placed before the Court as to the bridegroom intended for this girl. The District Judge sanctioned the marriage of the girl with the proposed bridegroom on the same day. Then, on 14th March last, certain facts having been brought to the notice of the District Judge, he suspended that sanction and warned all persons concerned not to proceed further upon the authority of that sanction. Subsequently, on 2nd April last, another proposal for the marriage of the minor with one Nainpully Jayaram was sanctioned.

Laxminarayan has preferred an appeal to this Court objecting to the last order made on 2nd April. On behalf of the respondents it is objected that no appeal lies as the order appealed from does not fall under S. 43, Guardians and Wards Act, and it is urged that all the orders made relating to the marriage of the minor are made under S. 12 of the Act.

In order to appreciate the merits of the preliminary objection, as also of this appeal, it is necessary to consider the question as to whether these orders relating to the marriage of the minor could be made under S. 12, Guardians and Wards Act. S. 12 of the Act relates to the temporary custody and protection of the person and property of the minor. It enables the Court to direct that the person having the custody of the minor

shall produce her or cause her to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper. The first order which was made on 14th December 1918 was a proper order under S. 12, and it purported to be made under that section. But the order made on 22nd February, sanctioning the marriage of the girl as also the last order made on 2nd April sanctioning another proposal as to the marriage of the girl cannot properly be treated as orders falling within the scope of S. 12, because they cannot be said to relate to the temporary custody and protection of the person of the minor. The only other provision under which the District Court could give directions as to the marriage of the minor would be S. 43 of the Act. We have not been referred to any other section of the Act under which these orders could be made. Under S. 43 the District Court can make an order regulating the conduct or proceedings of any guardian appointed or declared by the Court. It is only with reference to such a guardian that the Court could make an order regulating his conduct or proceedings. In the present case no appointment of a guardian of the person of the minor has been made; and the grandmother, who was allowed to retain the temporary custody of the minor under S. 12, cannot be treated as a person appointed or declared by the Court to be the guardian of the person of the minor. Under the circumstances it seems to us that all these orders as to the marriage of the minor made on 22nd February, 14th March and 2nd April are made without jurisdiction.

In this view of the matter it is clear that no appeal lies to this Court under S. 47 of the Act. But as the question is whether the orders complained of were made with or without jurisdiction, we can entertain the appeal as an application under our extraordinary jurisdiction and make an appropriate order with reference to the orders complained of. The proper procedure in our opinion for the District Court to follow would be to deal with the two applications which are pending in that Court for the appointment of a guardian of the person of the minor; and when a guardian of the per.

son is appointed, to give such directions to that guardian as it may think proper under the circumstances for the welfare of the minor.

It is unfortunate that this matter concerning the person of a female minor has been unavoidably delayed on account of the procedure followed in the lower Court and the subsequent proceedings taken in this Court by way of appeal. But it will be possible for the District Judge now to treat this as an urgent matter and to proceed with the applications pending before him without any avoidable delay.

We express no opinion whatever as to the merits of these orders, which we hold to have been made without jurisdiction.

We discharge all the orders made by the District Court relating to the marriage of the minor on 22nd February, 14th March and 2nd April.

Each party will bear his or her own costs in the appeal here, which must be treated as an application under extraordinary jurisdiction, and in the lower Court as to the said orders.

G.P./R.K. *Rule made absolute.*

A. I. R. 1920 Bombay 53

HEATON, J.

Gol Daji Hathi and others—Defendants—Respondents.

v.

Dod Laxman Kursan and others — Plaintiffs—Respondent.

Second Appeal No. 984 of 1918, Decided on 5th February 1920, from decision of Asst. Judge, Ahmedabad.

Landlord and Tenant—Ejectment—Notice cannot be dispensed with because tenant asserts different kind of tenancy—Transfer of Property Act (1882), S. 111 (b).

Inasmuch as the necessity for notice is an incident of tenancy before a tenant can be evicted, the mere fact that a tenant asserts that his tenancy is of one type although it turns out to be of quite a different type is no ground for dispensing with such notice. [P 54 C 1]

H. V. Divatia—for Appellants.

Judgment.—The facts in this case are somewhat complicated. But for the purposes of this second appeal the facts which emerge are these:

The plaintiffs are now, and at the date of the suit were, the owners of the land in suit. They sued to eject the defendants. Out of the defendants those with whom we are concerned are defendants 1 and 3 who are in occupation of the land. They claimed to be there as permanent

tenants. They appear to have been or they pretended to be uncertain as to who was their landlord, but that uncertainty is now removed. If they are tenants, their landlords are the plaintiffs. They claimed that they were permanent tenants, and this fact certainly emerges that they are either permanent tenants or annual tenants, and in either event they are entitled to notice.

The trial Court came to the conclusion that the tenancy had not been legally determined by proper notice and dismissed the suit.

The plaintiffs appealed to the District Court, and the District Court held that as to half the land the defendants were permanent tenants and could not be evicted. As to the other half the Court held that they could be evicted and made a decree accordingly.

It is the defendants who have appealed here. The plaintiffs, though notice was served on them, did not put in an appearance. The facts which I have to accept are that as regards the half of the land of which they are not permanent tenants the defendants are tenants apparently holding under an annual tenancy and I think there can be no doubt that as such they are entitled to notice before eviction. The Judge in appeal said: "in all these circumstances I do not think any previous notice was necessary." It is rather unfortunate that the point was not dealt with a little more fully, because the circumstances are numerous and somewhat complicated. But, as I have said, they result in this: that the defendants were holding as tenants, and as tenants, it seems to me, they were entitled to notice. In the case of *Vithu v. Dhondi* (1) we have a discussion of the question whether an assertion by a tenant that he is a permanent tenant, whereas in reality he is only an annual tenant, is a denial of the landlord's title such as to make eviction without notice lawful—I mean of course eviction by order of the Court. The discussion resulted in an expression of opinion that was not very definite. But though not very definite, it was undoubtedly to the effect that in such a case notice could not be dispensed with. I cannot take that decision as a binding authority because of its tentative character. But it seems to me that it was right. It seems to me that where you

(1) [1891] 15 Bom. 407.

have a tenant who is in the ordinary course of events entitled to notice, he cannot be lawfully evicted without notice, merely because he asserts that his tenancy is of one type although it turns out to be of a different type. The necessity for the notice is an incident of tenancy and it seems to me that as it attaches to a tenancy, whether annual or permanent, it cannot be dispensed with although the tenant may assert that he is a permanent tenant, whereas in reality he is only an annual tenant.

For that reason it seems to me that the decision of the first Court is correct and that the decision of the appellate Court in this matter of notice was incorrect.

I need not trouble myself to discriminate between facts which have been found by the first Court and facts which have been found by the appellate Court. The result, under the law applicable to the case, is that the suit has to be dismissed; because the suit is a suit to recover possession and the plaintiffs are not entitled to recover possession. They are not entitled to recover possession of half the land, because as to that half defendants 1 and 3 are permanent tenants. They are not entitled to recover possession of the remaining half, because whatever the nature of their tenancy, the defendants have not been served with a proper notice.

The appeal is therefore allowed, and the suit is dismissed with costs throughout.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 54

SHAH AND CRUMP, JJ.

Damu Diga—Plaintiff—Appellant.

v.

Vakrya Nathu and others—Defendants—Respondents.

First Appeal No. 170 of 1918, Decided on 19th December 1919, from decision of First Class. Sub-Judge, Dhulia, in Suit No. 43 of 1917.

(a) Civil P. C. (5 of 1908), O. 9, Rr. 3 and 8—Several defendants—Dismissal under R. 3 against some and under R. 8 against others—Subsequent suit is barred against former and not against others.

Where there are several defendants to a suit, the consequences of an order of dismissal for default need not necessarily be the same against all. If the suit is dismissed as against some under R. 8, O. 9, and as against the rest under R. 3 of the same order, a subsequent suit on the

same cause of action would be barred as against the former but not against the latter.

[P 55 C 1]

(b) Civil P. C. (5 of 1908), O. 32, R. 3—R. 3 is imperative—No decree against minor can be passed without appointing guardian.

The provisions of O. 32, R. 3, are imperative and without complying with those provisions the Court cannot make any decree between the plaintiff and a minor defendant. [P 55 C 1]

(c) Civil P. C. (5 of 1908), O. 9, R. 3 and O. 32, R. 3—Dismissal of suit on plaintiff's default in presence of major and minor unrepresented defendants—Dismissal against minors being under R. 3 subsequent suit against them is not barred.

Where a suit was dismissed for plaintiff's default in the presence of the major defendants and there was no appearance on behalf of the minor defendant, no guardian ad litem of the minor having been appointed:

Held: that a subsequent suit against the minor on the same cause of action was not barred, inasmuch as, (a) the order of dismissal as against the minor must be taken to have been made under O. 9, R. 3, and not under R. 8; and (b) the minor not being properly represented in the suit, no binding order could be made as between him and the plaintiff. [P 55 C 2]

M. V. Bhat—for Appellant.

P. V. Kane—for Respondents.

Crump, J.—The only question for our decision is whether the lower Court has rightly held that this suit is barred by the decision in Suit No. 185 of 1915 of the same Court. That the present plaintiff is the representative-in-interest of the plaintiff in that suit is not denied. The then defendants were three in number, and the present defendant was one of them. The question is, what is the nature of the order disposing of that suit and what is its effect. The terms of the order made clearly show that the Judge who made that order dismissed the suit for plaintiff's default. The order was made at an adjourned hearing and the Court must be taken to have acted under O. 17, R. 2, and to have based its order on the provisions of O. 9. It was argued that O. 17, R. 3, applied, but that is not so. The terms of the order show that the suit was dismissed on account of plaintiff's default and on no other ground. The decision in *Chandramathi Ammal v. Narayanasami Aiyar* (1) appears to contain a correct exposition of the relative scope of Ss. 157 and 158, Civil P. C., 1882, and that decision is equally applicable to Rr. 2 and 3, O. 17. As O. 17, R. 2, applies, we must refer to O. 9 for the authority to dismiss the suit.

(1) [1910] 33 Mad. 241=5 I. C. 23.

So far as the first two defendants were concerned, O. 9, R. 8, clearly applies. They were present and plaintiff was absent. But they are not parties now and the question is how the case stands as between plaintiff and defendant 3. I find it difficult to follow the lower Court in holding that for the purposes of R. 8, O. 9 it is sufficient if one or some of several defendants appear. It is necessary, as I read the law, to take the case of each defendant on its own merits. Here the order itself is merely one dismissing the suit, and, so far as the present defendant is concerned, may be referred to O. 9, R. 3, just as readily as to O. 9, R. 8. In the one case a subsequent suit is barred; in the other it is not barred. In the case of several defendants the consequences of an order of dismissal need not necessarily be the same against all. The present defendant was absent and *prima facie* therefore the order of dismissal as between him and the plaintiff would not bar a subsequent suit.

But there is a further fact which requires consideration. The present defendant was (and is) a minor. In the previous suit he was at the time represented by a proper guardian ad litem, the Nazir of the Court. At the date when the suit was dismissed, the Nazir's appointment had terminated and no guardian had been appointed. A minor defendant is a party to a suit in the eye of the law, but without the appointment of a guardian it was not possible for him to appear. It was in fact, owing to the absence of any guardian, that the suit stood adjourned. The Nazir's appointment was cancelled because the plaintiff failed to furnish him with funds as directed by the Court, but the suit was not dismissed owing to plaintiff's failure in this respect. At the date of the dismissal there was no guardian and the minor defendant was not therefore represented. Now the provisions of O. 32, R. 3, are imperative, and without complying with those provisions the Court could not make any decree as between the plaintiff and the minor defendant. As between these parties therefore any order is (in my opinion) a nullity. And the second suit cannot therefore be barred.

I would therefore reverse the decree of the lower Court and remand the suit

for disposal on the merits. Costs to be costs in the cause.

Shah, J.—I concur in the order proposed by my learned brother.

The facts connected with the previous suit filed by Devchand and his son Diga in 1915 have been accurately stated in the judgment of the lower Court. It is clear on those facts that the order dismissing the suit for default is referable to O. 17, R. 2, and not to R. 3 of that order. By the provisions of R. 2 the order must be taken to have been made under O. 9, R. 8, as regards defendants 1 and 2 in that suit, who were present on the date of the order.

The important question is as to what is the effect of that order on the present suit. In order to determine that it is necessary to consider whether the adopted boy was effectively made a party to the suit of 1915, on the admitted facts I am of opinion that he was really not a party to that suit at all at the date of its dismissal. He was joined as defendant 3 to the suit, but the first guardian for the minor proposed by the plaintiffs in that case was not accepted by the Court. Ultimately the Nazir of the Court was appointed the guardian ad litem of the minor. But in consequence of the plaintiffs in that suit having failed to supply the necessary funds to the Nazir, his appointment as the guardian ad litem was cancelled by the Court. The suit was then adjourned to enable the plaintiffs to propose another guardian. They proposed Laxmibai, the then defendant 2, but she refused to act as such. On the date of the dismissal of the suit in fact there was no guardian of the minor for the suit, as required by the Code of Civil Procedure, and it was not possible for the minor to appear on that day. Under those circumstances I am of opinion that really he was not a party to the suit at all on that day; and it is clear that no order binding on the minor could have been made in the suit. The order of dismissal must be held to be an order made on the footing that the only defendants in suit were defendants 1 and 2 (i. e., the natural father and the adoptive mother of the adopted boy). On this footing I think that the previous suit is no bar to the maintenance of the present suit. O. 9, R. 9, provides that the plaintiffs shall be precluded from bringing a fresh suit in respect of the same cause

of action. The order of dismissal affects the parties to the suit and cannot be held to apply to a fresh suit which is filed against the adopted boy who was not a party to that suit. It is urged for the respondents that the rule refers to the same cause of action and does not require that the parties to the fresh suit should be the same in order that the bar created by the rule may take effect. No authority is cited in support of this proposition; and I am not prepared to hold that the rule bars a suit against a person, who was not a party to the suit dismissed for default under R. 8.

Apart from that consideration, I am not satisfied that the cause of action in the present suit is the same as that in the previous suit. The previous suit was against the natural father and the adoptive mother of the adopted boy. Any order in that suit could not have affected the adopted boy. No doubt the principal allegation in the plaint related to the invalidity of the adoption. But there were further allegations made against the defendants in that suit, which were personal to themselves as to their fraudulent and deceitful acts and intent. The relief was claimed against them only. Even assuming that the allegations other than those relating to the invalidity of the adoption were not material, I am unable to hold that the cause of action against the adoptive mother and the natural father, if any, is the same as that against the adopted boy. In the present suit neither the natural father nor the adoptive mother is a necessary or a proper party; and though there may be apparent similarity between the two causes of action, and though the ground covered by the evidence necessary to prove the material allegations in both the suits may be common to a large extent, I feel clear that the cause of action, if any, against the natural father and the adoptive mother is quite distinct from that against the adopted boy.

I am therefore of opinion that R. 9 is no bar to the present suit.

G.P./R.K

Appeal allowed.

A. I. R. 1920 Bombay 56

SHAH AND HAYWARD, JJ.

Hanmant Timaji Desai—Defendant—Appellant.

v.

Raghavendra Gururao Desai—Plaintiff—Respondent.

First Appeal No. 6 of 1919, Decided on 12th February 1920, from decision of 1st Class Sub-Judge, Dharwar, in Darkhast No. 318 of 1918.

Civil P. C. (5 of 1908), O. 34, R. 14—Mortgage decree providing for sale of property on default of two instalments—Decree-holder cannot sell it on default of one instalment only.

A decree in a mortgage suit provided for payment of the mortgage-debt by instalments and directed that in the event of two instalments being in default the decree-holder would be entitled to recover the whole sum then due by sale of the mortgaged property. The judgment-debtor paid the first instalment, made default in the second and paid the third. The decree-holder applied to execute the decree by sale of the mortgaged property:

Held: that the decree-holder was bound by the terms of the decree and was not entitled to bring the property to sale, because admittedly there was a default in the payment of one instalment only at the time of the application for execution. [P 57 C 2]

N. V. Gokhale—for Appellant.

R. A. Jahagirdar—for Respondent.

Shah, J.—This appeal arises out of an application made by the decree-holder to execute the decree passed on an award. Originally, in 1904, a simple mortgage bond was passed by defendant 1 in favour of the plaintiff and his brother for Rs. 6,500. The disputes between the parties as to this bond were referred to an arbitrator and an award was made. Subsequently on the application of the plaintiff which was registered as a suit, a decree was passed in terms of the award. Under that decree the defendants were to pay Rs. 14,000 in eleven instalments. The first ten instalments were to be annual instalments of Rs. 1,300 each and the last instalment was to be of Rs. 1,000. The first instalment was to be paid on 1st August 1916 and the other instalments were to be paid on 1st August every following year. The decree further provided that in case of default by defendants to pay any two instalments out of the said instalments, the said instalments should be paid within six months from the date of default of the second instalment; and in case of default to pay the said instalments within six months accordingly plaintiff do recover the whole of

the amount, viz., the amount of the said two instalments and the subsequent instalments remaining unpaid on that day, together with costs by sale of the property mentioned in the simple mortgage bond. The defendants paid the first instalment on 1st August 1916, and the present darkhast was filed in July 1918 to recover the second instalment payable on 1st August 1917 with interest by sale of a part of the mortgaged property. The part of the mortgaged property was specified in the darkhast, and it was stated in the darkhast that the instalment payable on 1st August 1918 had been already paid to the decree-holder. The defendants objected to the sale of a part of the mortgaged property.

The First Class Subordinate Judge, who dealt with this darkhast, allowed execution to proceed on the footing that the defendants were personally liable to pay the sum of Rs. 1,300 and that it was open to the decree-holder to realize that amount by the sale of the property mentioned in the darkhast not as part of the mortgaged property, but as property, belonging to the judgment-debtors.

From this order the present appeal is preferred to this Court, and it is urged on behalf of the appellant that the darkhast is premature.

I desire to make it clear at the outset that in this darkhast we are concerned only with the prayer of the decree-holder to realize the amount of the instalment by the sale of a part of the mortgaged property. We are not concerned with the question as to whether, apart from any right to bring to sale a part of the mortgaged property, the decree-holder can recover the amount personally from the defendants or by the sale of any property of the judgment-debtors other than the mortgaged property. That question does not arise in this darkhast, and I express no opinion as to the remedy which the decree-holder may have as regards the sum in question against the defendants personally or the other property of the defendants.

It seems to me clear that on the facts stated above and on the terms of the decree, the present darkhast to bring to sale a part of the mortgaged property is premature. The instalment of Rs. 1,300 forms part of the mortgage amount; and the terms of R. 14, O. 34, show that where a mortgagee has obtained a decree

for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. The suit in which the plaintiff has obtained the decree now sought to be executed may be treated as a suit for sale in enforcement of the mortgage within the meaning of this rule. But it is clear that the decree-holder is not entitled to bring the mortgaged property to sale otherwise than by instituting such a suit. Treating the suit out of which these proceedings have arisen as a suit for sale in enforcement of the mortgage, it seems to me that the decree-holder is clearly bound by the terms of the decree. Under the terms of the decree the plaintiff can recover the whole amount which may have remained unpaid after default in the payment of any two instalments by the sale of the property mentioned in the mortgage bond. At the date of this darkhast the contingency had not arisen, because admittedly there was a default in the payment of one instalment only at the time. The whole amount had not become due, and the right to bring the property to sale under the decree had not accrued to the decree-holder. Under these circumstances it seems to me that the present darkhast is premature, treating it strictly as a darkhast for enforcing the decree by the sale of a part of the mortgaged property. In my opinion the lower Court was wrong in allowing the property to be sold otherwise than under the terms of the decree.

I would therefore allow this appeal and dismiss the darkhast without prejudice to the right of the decree-holder to claim this amount in any subsequent darkhast which he may be advised to file.

Having regard to all the circumstances we direct that each party should bear his own costs throughout.

Hayward, J.—I agree. It is an anomalous decree and it is quite possible that the second instalment of Rs. 1,300 will be recoverable at once personally against the judgment-debtor notwithstanding the provisions of Rr. 4 and 6, O. 34, Sch. 1, Civil P. C. But it seems to me quite clear that the amount is not recoverable now by the sale of any part of the mortgaged property both in view of the precise terms of the decree and of

the principles underlying R. 14, O. 34, Sch. 1, Civil P. C.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 58 (1)

HEATON AND PRATT, JJ.

Nagindas Bhukandas—Appellant.

v.

Ghelabhai Gulabdas—Respondent.

First Appeal No. 234 of 1918, Decided on 1st December 1919, from decision of Dist. Judge, Surat, in Misc. Insol. Case No. 14 of 1915.

Provincial Insolvency Act (3 of 1907), Ss. 43, 46 and 47—Sentence under S. 43 can be suspended till disposal of appeal.

On an appeal from a sentence of imprisonment under S. 43, Provincial Insolvency Act, the High Court has power under O. 41, R. 5, Civil P. C., read with Cl. (2), S. 47, Provincial Insolvency Act, to suspend the sentence until the appeal is disposed of. [P 58 C 1]

Heaton, J.—We are dealing with an interlocutory matter that arises out of an appeal filed under Cl. 2, S. 46, Provincial Insolvency Act, 3 of 1907. The appellant was sentenced to three months simple imprisonment. He has appealed.

There is no doubt that the appeal lies and not unnaturally he wants the sentence of imprisonment suspended until the appeal is disposed of. Otherwise he stands a very good chance of serving out the entire term of imprisonment before the appeal is heard. It has however, been objected—and this is the only point that seems to me really to need attention—that we have no power to suspend the imprisonment or release a person on bail. That argument however I think is mistaken. Cl. 2, S. 47, Provincial Insolvency Act, tells us that in dealing with this appeal we are to follow the provisions of the Civil Procedure Code. At least that is the effect of what that clause says. Now under the Civil Procedure Code we have power to stay proceedings under an order appealed from. That I think is quite plain from O. 41, R. 5, Civil P. C., and all we are asked to do is to stay proceedings under the order appealed from. We do this by making an order which will secure the release of the appellant from jail on such terms as may be provided. We leave the terms to be settled by the District Judge, who will direct what security should be taken from sureties to secure the surrender of the appellant should he hereafter be called upon to surrender.

The District Judge, will make out an order to the jailor directing the release of the appellant when security to his satisfaction has been furnished.

Costs of this matter will be costs in the appeal.

Pratt, J.—I concur. In regard to the argument that O. 41, R. 5, does not apply because there is no decree to be executed, it seems to me that the provisions in that rule which provide for stay of proceedings under an order are applicable. For instance an order of arrest before judgment under O. 38, R. 4, would be appealable under S. 104 (b), Civil P. C., and it could not be contended that the Court of appeal in such a case would not have the power to stay further proceedings either by suspension of the sentence or directing the release of the appellant on his giving the bail. That this provision of the Civil Procedure Code would be applicable was apparently the view expressed by Bayley, Actg. C. J., in *Hormarji Ardesir Hormarji, In the matter of* (1).

G.P./R.K.

Order accordingly.

(1) [1893] 17 Bom. 334.

*** A. I. R. 1920 Bombay 58 (2)**

SHAH AND CRUMP, JJ.

Nagindas Bhukandas—Appellant.

v.

Ghelabhai Gulabdas—Respondent.

First Appeal No. 234 of 1918, Decided on 1st December 1919, from decision of Dist. Judge, Surat, in Misc. Insol. Appln. No. 14 of 1915.

* Provident Funds Act (9 of 1897), S. 4—Money in provident fund does not vest in receiver—Fraudulent dealing with it by insolvent is not offence under Provincial Insolvency Act (3 of 1907), S. 43.

By virtue of S. 4 neither the receiver nor the creditors of an insolvent have any right to money drawn by the insolvent from his compulsory deposit in a Railway Provident Fund. There can therefore be no fraudulent dealing in respect of such money such as is made punishable by S. 43, Provincial Insolvency Act. [P 60 C 1]

N. K. Mehta—for Appellant.

H. V. Divatia—for Respondent.

Crump, J.—The appellant in this case appeals against an order of the District Judge of Surat sentencing him to three months' simple imprisonment under S. 43, Provincial Insolvency Act (3 of 1907).

The facts are shortly as follows: The appellant Nagindas was in the employ of the B. B. & C. I. Ry. Co. On 3rd Novem-

ber 1909 he was adjudged an insolvent under S. 16 of the Act, and a receiver was appointed. In January 1918 he resigned his appointment with the railway company and drew from them a sum of Rs. 2,000 odd which stood to his credit in the books of the Railway Provident Fund. This money was not paid over to the receiver and in the lower Court it was alleged that Rs. 1,600 out of this sum had been paid by the insolvent to his wife. It is with reference to this transaction that the learned District Judge has held him guilty of a fraudulent act within the meaning of S. 43 (2) of the Act.

The reasoning of the learned District Judge may be summarized as follows: The protection afforded to the moneys in the Provident Fund by S. 16 (2) (a) of this Act ceased as soon as these moneys came into the hands of the insolvent and they forthwith vested in the receiver and become divisible among the creditors as provided by S. 16 (4). But in accordance with the doctrine in *Cohen v. Mitchell* (1) the insolvent was entitled to return the money received from the Provident Fund unless and until the receiver intervened, and had he merely retained it he would not have been guilty of any fraud. But he had advanced a false story to prove that the money had been paid to his wife in satisfaction of a legal claim. This allegation amounted to a fraudulent transfer punishable under S. 43.

The case of *Cohen v. Mitchell* (1) is not a decision on the Provincial Insolvency Act, but on the English Bankruptcy Act (46 & 47 Vic. c. 52), and the decisions on which the learned District Judge has relied for extending the applicability of the doctrine therein laid down to the case before him are decisions in cases arising in the presidency towns prior to the Presidency Towns Insolvency Act, 1909. These cases are governed by the provisions of the Indian Insolvency Act, 1848. It is therefore necessary in the first instance to examine the terms of the relevant statute.

It is not disputed that the deposit with which we are now concerned was a compulsory deposit as defined in S. 2, Provident Funds Act, 1897, and it is clear that at the date of the adjudica-

tion order it was not at the disposal of the insolvent for his own benefit. Therefore it was not at that date "property" within the definition contained in S. 2 (1) (e), Provincial Insolvency Act, and did not therefore vest in the receiver under S. 16 (2). But, apart from the provisions of S. 4, Provident Funds Act, 1897, it became "property" as soon as the money was paid to the insolvent, and was thus property acquired by him after the date of the order of adjudication. Under S. 16 (4) such property

"shall forthwith vest in the Court or receiver and shall become divisible among the creditors in accordance with the provisions of sub-S. (2), Cl. (a)."

At first sight it would appear that these words in their literal construction are free from any doubt.

But there are grounds for holding that these words should not be literally construed. In *Cohen v. Mitchell* (1) the Court declined to follow the literal construction of Ss. 44 and 54, English Bankruptcy Act, on the ground of inconvenience and the Courts in India, in dealing with the analogous provisions of S. 7, Insolvency Act (11 & 12 Vic. c. 21) have allowed themselves the same measure of freedom: see *Alimahmad v. Vadilal Devchand* (2). These Acts are in pari materia, and the considerations which have led the Courts to reject a literal construction are equally present in the case of the Provincial Insolvency Act. Nor is there so great a difference between the words employed by the legislature as to permit of any distinction. It must therefore follow that in the present case also the doctrine in *Cohen v. Mitchell* (1) is applicable.

But it remains to consider the effect of S. 4, Provident Funds Act, 1897. So far as the section bears upon the facts of this case it runs as follows:

Neither the Official Assignee nor a receiver appointed under Ch. 20, Civil P. C., shall be entitled to or have any claim on any such compulsory deposit (i. e., any compulsory deposit in any Railway Provident Fund)."

By virtue of S. 59, Provincial Insolvency Act, the reference to Ch. 20, Civil P. C., must for the purposes of this case be construed as applying to S. 16 of the former Act. What then is the force of the words "shall be entitled to or have any claim on any such compulsory deposit?" We are not here concerned with cases of at-

(1) [1890] 25 Q. B. D. 265=59 L. J. Q. B. 409 =68 L. T. 206=38 W. R. 851=7 Morrell 207.

(2) [1919] 43 Bom. 890=53 I. O. 197.

tachment under a decree or order of a Court, and it is unnecessary to refer to the provisions of the Code of Civil Procedure to which reference is made in S. 16, Provincial Insolvency Act. We have a specific provision applying directly to the case of a receiver appointed under that Act. The question is whether the learned District Judge is right in holding that the protection afforded by the section ceases when the money comes into the hands of the depositor. In my opinion that is too restricted a construction. The words used are very wide. No receiver has any claim on such compulsory deposits. If that is so, how can he claim to receive the money when it is paid into the hands of the depositor? The case of *Official Assignee of Madras v. Mary Dalgairns* (3) is here in point. That decision was prior to the amendment of the Provident Funds Act in 1903 whereby Cl. 2 was added to S. 4, and is therefore a decision as to the effect of Cl. (1) of the section. It was held that the effect of Cl. (1) was to deprive the Official Assignee of the right which had otherwise vested in him to receive the sum standing to the credit of the insolvent on the insolvent's retirement from the service. That decision is with reference to S. 7, Insolvency Act, but it is equally applicable to the present case. In my opinion that decision is correct and should be followed. The result is that neither the receiver nor the creditors have any claim to the money drawn by the insolvent, and therefore there could be no fraudulent dealing such as is made punishable by S. 43, Provincial Insolvency Act.

In this view of the case it is unnecessary to determine whether on the basis of the findings of the District Judge any fraudulent dealing is established. It may however be remarked that it is difficult to reject the defence specifically pleaded by the insolvent that he was under a bona fide belief that the amount was not attachable and consequently did not vest in the receiver. Even if it be assumed that the learned District Judge has correctly apprehended the law, the point is surrounded with so much doubt that the insolvent may well have entertained a bona fide belief that the amount in question was entirely at his disposal.

For these reasons I would set aside the order of imprisonment. The respondent

(3) [1908] 26 Mad. 440.

to bear the costs throughout. The bail bond to be discharged.

Shah, J.—I concur.

G.P./R.K.

Appeal decreed.

A. I. R. 1920 Bombay 60

SHAH AND CRUMP, JJ.

Kachu Ravji Mindhe Vanjari—Appellant.

v.

Trimbak Khemchand Gujrathi—Respondent.

Letters Patent Appeal No. 23 of 1918 Decided on 19th November 1919, against decision of Heaton, J., in S. A. No. 413 of 1918.

Civil P. C. (5 of 1908), O. 21, R. 89—Appellate order dismissing application to set aside sale is not appealable — Decree-holder being auction-purchaser is immaterial.

No second appeal lies from an appellate order dismissing an application under O. 21, R. 89, to set aside an execution sale. The accident of the auction-purchaser being the decree-holder makes no difference. [P 60 C 2]

P. V. Kane—for Appellant.

A. G. Desai—for Respondent.

Judgment.—It is urged as a preliminary objection to this appeal that no second appeal lies to this Court. The original application out of which this appeal has arisen was made under R. 89, O. 21, by the judgment debtor. That application was rejected. There was an appeal from that order to the District Court of Nasik and that appeal was dismissed. From the order dismissing the appeal a second appeal was preferred to this Court; and the point now raised is that such a second appeal is not competent. It is clear that the appeal to the District Court was an appeal under O. 43, R. 1, Cl. (j), and that under S. 104, sub-S. 2, Civil P. C., no appeal can lie from any order passed in appeal under the section. The only ground upon which it is said that the present case falls outside the scope of S. 104, sub-S. 2, is that the auction-purchaser happens to be the decree-holder and that the order on the application of the judgment-debtor is an order relating to the execution of the decree between the parties under S. 47. We do not think however that the accident of the auction-purchaser being the decree-holder makes any difference in the effect of the provisions of S. 104, sub-S. 2. Whether the auction-purchaser be the decree-holder or a third person, the result is the same so far as the appealability of the order is concerned.

The appeal must therefore be dismissed with costs on the ground that no second appeal lies to this Court.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 61

MACLEOD, C. J. AND HEATON, J.

Akbaralli Mir Inayatalli and others—
Plaintiffs—Appellants.

v.

Abdul Ajiz Mirsaheb Jahagirdar—
Defendant—Respondent.

Second Appeal No. 24 of 1919, Decided on 5th January 1920, from decision of Dist. Judge, Ahmednagar, in Appeal No. 52 of 1917.

(a) *Adverse Possession—Decree passed—*
Prior possession cannot be tacked on to latter one.

The period of adverse possession is calculated for the benefit of the party setting up adverse possession, and if a decree is passed against him then there is an end of that period, and he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree.

[P 61 C 3]

(b) *Adverse possession—Proof—Proof of*
adverse possession in face of decree must be very strong.

It would require very strong evidence on the part of a losing party to acquire a fresh title by adverse possession against the decree of a Court and he must act in such a way that the parties interested could have no doubt whatever with regard to his motives in order that they might be enabled to take proper steps to stop time from running.

[P 61 C 2]

*Weldon and J. G. Rele—*for Appellants.

*S. R. Bakhale—*for Respondents.

Judgment.—The plaintiffs brought this suit to establish their sole right to manage the Devasthan of Usthal, alleging hereditary right and ancient and immemorial custom, against defendants 1 and 4 as representing a Board of management elected by various cosharers under the Collector's order of 23rd March 1908. This question appears to have been decided against the plaintiffs by a decree of the High Court in Suit No. 96 of 1893 which was passed on 7th July 1896. Apparently, after the decree was passed the plaintiffs remained in possession, and nothing was actually done by the other side to get into possession until the Collector's order of 1st August 1908.

It is suggested in the first place, that the plaintiff can tack on the period of adverse possession before the decree in Suit No. 96 of 1893 to the period after the decree, so that they acquired an absolute title after 12 years from the date

of the original possession. That is an argument which we cannot accede to. The period of adverse possession is calculated for the benefit of the party setting up adverse possession, and if he loses, then there is an end of that period, and he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree. But we cannot presume, since the decree was passed by the High Court on 7th July 1896, that the plaintiffs in this suit determined at once to hold adversely to the successful party, and in effect in contempt of the decree of the High Court. It is quite possible, after the decree had been passed and after the successful party was so remiss in seeking to execute it, the plaintiffs might have gathered fresh courage, and might have, after a certain period had elapsed from the date of the decree, determined to set up again a title in themselves against the successful party in that suit. But we have no evidence of that and certainly there is no evidence that they took that attitude before 1st August 1908. But we think that it would require very strong evidence indeed on the part of a losing party to acquire a fresh title by adverse possession against the decree of the High Court or of any Court, and he would certainly have to act in such a way that the parties interested could have no doubt whatever with regard to his motives in order that they might be enabled to take proper steps to stop time from running. But in this case, although the execution of the decree in Suit No. 96 of 1893 was barred by time, yet as laid down by the late Chief Justice in *Bala Kushaba v. Abai Amrita* (1), although the remedy may be barred, the right remains. We therefore think that the decision of the learned District Judge was correct. The appeal fails and must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

(1) [1909] 4 I. O. 246.

A. I. R. 1920 Bombay 62

MACLEOD, C. J. AND HEATON, J.

Ganpat Ramrao Masur—Defendant—Appellant.

v.

Krishnadas Padmanabh Chandavarkar—Plaintiff—Respondent.

Second Appeal No. 294 of 1918. Decided on 25th November 1919, from decision of Dist. Judge, Kanara, in Appeal No. 90 of 1917.

Co-operative Societies Act (2 of 1912), S. 42 (2) (e)—Orders under S. 42 (2) (e) by liquidator for collection of assets cannot be challenged in civil Court.

Where in the course of winding-up a Co-operative Society the liquidator makes orders under S. 42, in order to collect certain assets of the Society from persons whom he thinks are responsible to account to him for such assets, the civil Court has no jurisdiction to intervene. [P 62 C 2]

S. S. Patkar—for Appellant.

S. N. Karnad—for Respondent.

Macleod, C. J.—These are four companion second appeals. In the original suits certain parties, against whom orders had been passed by the liquidator of the Chandavar Agricultural Co-operative Stores Society, filed the suits for a declaration that the orders passed by the liquidator were null and void. The facts are that this Society was in the process of being wound up, and a liquidator had been appointed. He made certain orders against these various plaintiffs in the course of the winding-up, in order that he might get in the assets of the Society.

Section 42 (2) (e), Act 2 of 1912, gives the liquidator power to give such directions in regard to the collection and distribution of the assets of the Society, as may appear to him to be necessary for winding up the affairs of the Society. R. (4) under the section provides that "where an appeal from any order made by a liquidator under this section is provided for by the rules, it shall lie to the Court of the District Judge."

As a matter of fact an appeal is not provided for by the rules. Then sub-S. (6), provides :

"Save in so far as is herein before expressly provided, no civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered Society under this Act."

That subsection ousts the jurisdiction of a civil Court entirely. It is impossible to see how we can deal with a matter which is connected with the dissolution of a registered Society. As was pointed

out in *Mathura Prasad v. Sheobalak Ram* (1), though the liquidator may be probably wrong in passing an order, still, if the order was one within S. 42 of the Act, the civil Court has no option, but to enforce it, and no appeal lies to the District Judge nor a second appeal to the High Court. Of course, if the liquidator passes an order which does not come within S. 42, that is a different matter altogether. Here these are orders made by him in order to collect certain assets of the company from persons whom he thought were responsible to account to him for such assets. Therefore all these orders were matters connected with the dissolution of a registered Society and the civil Court has no jurisdiction. Therefore Second Appeal No. 294 of 1918 must be allowed, the decree set aside and the suit dismissed with costs throughout, and Second Appeals Nos. 881, 882 and 888 of 1918 are dismissed with costs.

Heaton, J.—I concur. It seems to me that the legislature could hardly have expressed themselves with greater force and greater clearness than they have done in Cl. (6), S. 42, Act 2 of 1912. They intended to exclude the jurisdiction of the civil Courts, and they have made it quite plain by the words used what their intention was. It is not for us to try and evade or stultify the intention of the legislature so clearly expressed, by hair-splitting arguments as to whether a particular act or order of the liquidator is or is not concerned with the dissolution of a registered Society. There can be no doubt that all his acts as liquidator, at any rate, in all ordinary cases, are concerned with the dissolution of a registered Society, and it is only if a liquidator's act or order is shown to be clearly ultra vires, that is outside the powers conferred upon him by law as a liquidator, that the civil Court could possibly intervene. What the liquidator has done in these cases is a very ordinary kind of thing for the purpose of liquidation. He has done his best to get in the assets of the Society, which he is expressly empowered to do by Cl. (e), S. 42 of the Act, and he has given such directions, or made such orders, as seemed to him in the circumstances of the case to be the most effective way of getting in what after inquiry he had come to the conclusion were the assets of the Society. It seems

(1) [1918] 40 All. 89=42 I. C. 968.

to me that it would be both against the law and against our conscience to hold anything else than that these suits are excluded from the jurisdiction of the civil Court.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 63

SHAH AND HAYWARD, JJ.

Permeshwari Subbi—Applicant.

v.

Emperor—Opposite Party.

Criminal Appln. No. 417 of 1919, Decided on 24th February 1920, for revision of order of Sess. Judge, Kanara.

Penal Code (45 of 1860), S. 372—Performance of 'gejje' ceremony of minor girl does not amount to offence under S. 372.

The mere performance of what is known as the 'gejje' ceremony in respect of a minor girl does not amount to a disposal of the girl with the intent that she shall be employed or used for the purpose of prostitution, within the meaning of S. 372. [P 68 C 2]

G. P. Murdeshwar—for Accused.

S. S. Patkar—for the Crown.

Shah, J.—The applicant before us has been convicted under S. 372, I. P. C., for having disposed of her daughter Subbi under the age of 16 with intent that she shall be employed or used for the purpose of prostitution. The trial Court found that the ceremony described in the record as gejje ceremony was in fact performed in respect of the girl in question, and that the performance of that ceremony amounted to a disposal of the girl within the meaning of the section. The accused was accordingly convicted. In appeal the learned Sessions Judge has found that

"a girl, who, upon the strength of the 'gejje' ceremony alone, should begin to practise harlotry, would incur reprobation among her fellows, and would be put out of communion with the caste. Dedication to the life of a courtesan is not made by 'gejje' shastra but by 'fals-hobhan,' which is the wedding of the votaress and her god."

It is further found by him that the girl in question has not become a prostitute and that it is not admitted that she is intended to become a prostitute. He apparently believed the evidence adduced to show that some of the girls who had gone through this ceremony were married women. He felt however pressed with what he believed to be the effect of certain decided cases and confirmed the conviction and sentence.

In the application before us it has been argued on behalf of the applicant that

on the findings there is no dedication of the girl which would amount to a disposal within the meaning of S. 372, I.P.C. It seems to me on the findings of the appellate Court that this contention is well founded. It may be that the performance of the 'gejje' ceremony may ultimately facilitate the fall of this girl. But it is not a necessary consequence of the ceremony; according to the findings that she should be treated as a girl dedicated to a temple as a dancing-girl. The decisions in *Queen-Empress v. Tippa* (1) and *Reg. v. Jaili Bhavin* (2) must be taken to have been based upon the proved or admitted facts in those cases. In both these cases there was undoubtedly the fact of the dedication of the girl to the temple. In the present case on the findings it cannot be said that the girl is dedicated to the temple. On the contrary, on the findings of the appellate Court it would appear that the ceremony described as the 'fals-hobhan' ceremony would mark the stage when the girl is dedicated to the temple. The distinction which the Sessions Judge has drawn between the two stages marked by the performance of the 'gejje' ceremony, and the 'fals-hobhan' ceremony is apparently based on the evidence in the case and must be accepted for the purpose of this application.

In the case of *Srinivasa v. Annasami* (3), to which a reference has been made, the facts were different. This case, like the other two cases, must be taken to have been decided with reference to the facts of the case. In the present case it seems to me that the position of the girl for all practical purposes with reference to her surroundings continued to be much the same after the ceremony as it was before. She continued to live with her mother, and it is not shown to be a necessary consequence of the performance of the ceremony that she should either leave her mother or that she cannot marry, or that she must lead the life of a prostitute. Under these circumstances the mere fact of the performance of the ceremony cannot be treated as amounting to a disposal within the meaning of S. 372 of the girl by her mother. It must be distinctly understood that I have reached this conclusion on the facts

(1) [1892] 16 Bom. 737.

(2) [1869] 6 B. H. C. R. 60 Cr.

(3) [1892] 15 Mad. 41=1 Weir 365.

found by the lower appellate Court in this case.

I would make the Rule absolute, set aside the conviction and sentence and direct the fine, if paid, to be refunded.

The bail bonds to be cancelled.

Hayward, J.—I concur. The ceremony known as 'gejje' shastra that was performed has been held to have been merely preliminary and not the ceremony of dedication known as 'falshobhan' which has been held the final ceremony. The case differs therefore, from the complete dedication to a temple which was proved in the cases of *Reg v. Jaili Bhavin* (2) and *Queen-Empress v. Tippa* (1). It seems to me therefore that there has been no disposal of the girl on the facts found by the learned Sessions Judge within the meaning of S. 372, I. P. C.

G.P./R.K.

Rule made absolute.

A. I. R. 1920 Bombay 64

MACLEOD, C. J., AND HEATON, J.

Laxmishankar Devshankar — Plaintiff—Appellant.

v.

Hanjabhai Usufally—Defendant—Respondent.

First Appeal No. 265 of 1917, Decided on 25th November 1919, from decision of Addl. 1st Class Sub-Judge, Ahmedabad, in C. S. No. 476 of 1915.

Civil P. C. (5 of 1908), O. 6, R. 17 — Plaintiff in suit under O. 21, R. 103, for possession against mortgagee in possession cannot be allowed to be amended into one for redemption.

Plaintiff, the assignee of a decree for certain property, applied to execute the decree but execution was opposed by the defendant who claimed to be in possession as mortgagee. Plaintiff then applied under O. 21, R. 97, Civil P. C., to have the obstruction removed. The Court without making any inquiry whether the claim of the defendant to be in possession as mortgagee was good against the plaintiff, dismissed the application and referred plaintiff to a regular suit and this order was confirmed upon appeal. He then brought a suit under O. 21, R. 103 of the Code, for possession of the property alleging that there was no mortgage which he need redeem. It was found that the mortgage was not nominal nor was it without consideration. He thereupon asked to be allowed to amend the plaint and convert the suit into one for redemption, but his request was disallowed and his suit dismissed. On appeal to the High Court:

Held: that the suit had been rightly dismissed and that the plaintiff could not be allowed to amend his plaint as such amendment would entirely alter the nature of the suit. [P 66 C 2]

G. N. Thakor—for Appellant.

H. V. Divatia—for Respondent.

Macleod, C. J.—The property to which this suit refers is situated in Ahmedabad and known as the Dudhadhari vadi, which was managed by the Mohants of a certain temple. The last Mohant was one Surajbharthi who disappeared in 1886. Thereafter one of his sons Dattabharthi took his place until he went on a pilgrimage. In 1902 a report having been received that he was dead, one Vaghbharthi was installed on the Gadi alleging that he was a chela of Surajbharthi. One Shivbharthi, claiming to be the chela of Dattabharthi, filed a suit in the Mamlatdar's Court for possession. Meanwhile Dattabharthi returned and a decree was passed in Shivbharthi's favour in 1904 under which Dattabharthi got possession of the vadi. Dattabharthi and Shivbharthi mortgaged the property to one Shivnath in 1904 for Rupees 3,000, and again executed a fresh mortgage, which consolidated the first mortgage, on 25th October 1904 for Rs. 5,000. Shivnath got possession of the property as mortgagee. Then Vaghbharthi filed a suit for possession against Dattabharthi, Shivbharthi and Shivnath. Vaghbharthi and Dattabharthi referred the disputes between themselves to arbitration, and under an award decree the property was awarded to Vaghbharthi on payment of Rs. 1,201 to Dattabharthi. That sum was paid in satisfaction, which was recorded. It must be noted that Shivnath and Shivbharthi were not parties to these proceedings. Vaghbharthi then attempted to obtain possession of the property under the award decree, but owing to the opposition of Shivnath and Shivbharthi he did not obtain possession. His next step was to file a redemption suit against Shivnath and that was dismissed for nonpayment of court-fees.

In 1910 he again attempted to issue execution under the award decree but that application was dismissed for default. In the same year Dattabharthi and Shivbharthi executed another mortgage to Shivnath for a total of Rs. 9,000, which included the Rs. 5,000 belonging to the mortgage of 1904. It was obvious that Dattabharthi was then adopting an attitude opposed to the award decree. In February 1911 Vaghbharthi agreed to sell to Laxmishankar, the present plaintiff, but the sale deed was not registered until 21st February 1912, and it was not until 1915 that Vaghbharthi as-

signed the award decree to the purchaser. About the same time the sale deed to Laxmishankar was registered, Shivnath, Dattabharthi and Shivbharthi purported to sell the property to the present defendants for Rs. 25,000, and Shivnath was actually paid Rs. 12,000, and passed an indemnity bond undertaking to refund Rs. 12,000 if it was found that the vendor had no title. Laxmishankar in 1912 issued a darkhast to execute the award decree and execution was opposed by the present defendants. He then applied by Miscellaneous Application No. 87 of 1913 to have the obstruction removed. That application was made under O. 21, R. 97. The Court rejected the application and said that the applicant must bring a regular suit if he wants possession from Shivnath, the original mortgagee, or his representatives in the circumstances stated above. It did not attempt to enter into an inquiry whether the claim of the mortgagee to be in possession was good against the applicant. The applicant appealed from that order and the order was confirmed by a decree of the High Court in First Appeal No. 168 of 1913. The judgment says:

"It is clearly for the benefit of the purchasers of Shivnath's rights under deed of 23rd February 1913 to keep alive these mortgage rights. We cannot hold that they have been extinguished. It may be a question whether Shivnathji had any rights, but that could only be established in a suit brought against Shivnathji or his transferees, who were not parties to the award decree."

Thereupon the plaintiff filed this suit under O. 21, R. 103. It states that:

"any party not being a judgment-debtor against whom an order is made under R. 98, R. 99 or R. 101 may institute a suit to establish the right which he claims to the present possession of the property; but subject to the result of such suit (if any), the order shall be conclusive."

There must be some distinction between a regular suit and a suit filed under O. 21, R. 103. There is a specific period of limitation prescribed for suits brought under O. 21, R. 103, namely, Art. 11-A, Lim. Act. But that only applies when the Court dealing with an application under O. 21, R. 7, enters upon an inquiry and investigates the claim: see *Rustomji's Limitation Act*, p. 215, referring to *Meerudin Saib v. Rahisa Bibi* (1) and other cases cited in foot-note 4. But if it appears that the Court declines to enter upon an inquiry regarding the

validity or otherwise of the mortgage or other title on which the person obstructing the possession of the decree-holder relies, and directs the decree-holder to bring a regular suit, then it seems to me that it is no use for the decree-holder to bring a suit under O. 21, R. 103. He is referred to the ordinary procedure to establish a claim which he seeks to make against the property. In this case as the Subordinate Judge had made no inquiry into the validity of Shivnath's mortgage, but merely directed the decree-holder to bring a regular suit and that order was confirmed by the High Court, it follows that no conclusive order had been made, and the decree-holder was entitled to his ordinary remedies to establish his right to the property claimed by Shivnath, and he could only do that by getting the mortgage set aside. This suit now under appeal although filed under O. 21, R. 103, is dealt with by the learned Subordinate Judge as a regular suit. Although he came to the conclusion that the plaintiff ought to have filed a regular suit and not one under O. 21, R. 103, still a very large number of issues were raised, and a great deal of evidence relating to those issues was taken, and the learned Judge came to the conclusion that Shivnath's mortgages were not nominal mortgages or without consideration.

The plaintiff, considering the attitude of the learned Judge as regards the mortgages of Shivnath, seems to have then asked that the nature of the suit should be changed to a suit for redemption. This request was disallowed, and we think rightly, as that would entirely alter the nature of the suit, whether it was brought under O. 21, R. 103, or whether it had been brought originally as a regular suit. It seems to me that the finding of the learned Judge that the mortgage was not purely nominal, and without consideration, if justified by the facts of the case, since so far back as 1907 Vaghbharthi had filed a suit to redeem Shivnath, and thereby admitted that the mortgage was valid, and the only question to be considered was what was the amount due to the mortgagee so that the mortgagor could redeem the mortgage, and these facts were perfectly well-known to the plaintiff who bought Vaghbharthi's rights in 1911.

Mr. Thakor for the appellant very strongly urged us to allow him to redeem

(1) [1904] 27 Mad. 25.

on the ground that a great deal of evidence, which has been taken on the issues in the case with regard to the history of the parties and their relation to the property in suit which he filed, would all be thrown away. No doubt the rules with regard to the amending of pleadings are very wide, but the Court is generally strongly opposed to allow an amendment which entirely alters the nature of the suit. The suit was one really, although it was not specifically so stated in the plaint, to get rid of the mortgages in favour of Shivnath, and having failed to do that, the plaintiff now wants to turn round, and to alter the nature of the suit to make it one based on the validity of the mortgages, the only question being what amount should the plaintiff pay to redeem the mortgages. In a recent case which was before the Court of appeal in England, a suit was filed for damages for breach of contract. The defendant pleaded that there had been negotiations between the parties after the breach, the result of which was a second agreement in discharge of the alleged cause of action for the original breach. The Court found that the original cause of action had disappeared, for the parties had agreed that the breach should be considered as satisfied. Then the plaintiff asked for leave to amend his suit so as to make it a claim for damages for breach of the second agreement. The trial Judge disallowed that request to amend, and the appeal Court supported him on the ground that the nature of the suit being changed it was far more convenient that the claim for damages for breach of the second agreement should be brought in a separate suit. In my opinion therefore the decree dismissing the suit of the learned trial Judge must be upheld and this appeal must be dismissed with costs. The cross-objections in view of our finding do not arise and must be taken as withdrawn. No order as to costs of the cross-objections.

Heaton, J.—We are deciding this case as it was put before the Court by the plaintiff. It is a suit to recover possession. The principal opponent to the suit is one who claims as being a mortgagee and who claims to be in possession in virtue of the mortgage. The plaintiff claims to dispossess him. If the conclusion is arrived at that the defendant's

claim under the mortgage is not disproved, then the suit must be dismissed, and that is the conclusion arrived at. I speak of a mortgage though there are several, but I have in mind the earliest mortgage of all, one of 1904, or rather the second mortgage of that year. It has been said that the property Dattabharthi was mortgaging was not his to deal with; secondly, that the mortgage was nominal; and thirdly, that the consideration was never paid. These matters have all been dealt with in great detail by the trial Judge, who has written a very long and clear judgment and has arrived at definite findings on those points against the plaintiff. It seems to me, now that we have looked into the facts of the case that the judgment of the Court is unanswerable on these particular points that he has decided. It seems to me quite impossible to hold, in the circumstances disclosed, that Dattabharthi mortgaged a property which was not his to mortgage, or in which he had not an interest which he could mortgage. We think it impossible to assert that the mortgage was nominal or that it was without consideration. But the plaintiff has strongly urged us to allow him to amend the plaint and convert the suit into, at any rate alternatively, a claim for redemption. It is perfectly true that the inquiry made by the trial Judge and the decision arrived at by him cover a great deal of the ground that will have to be covered in a redemption suit, and from the plaintiff's point of view it would be very convenient that he should have his present claim for redemption determined in this suit, where there is already a great deal of the evidence required for the purpose. But the suit itself was brought quite clearly and definitely to show that there was no mortgage which he need redeem. It was fought out on those allegations, and the appeal here was most strenuously pressed on the same allegations. So it comes to this and it is a very common practice, that when a party has obtained a decision against him in the highest Court of appeal to which he can resort then he says:

"Oh now that you have decided against me on the ground on which I brought my suit, I want to put in an alternative claim, and have that decided."

We are very frequently asked to allow such requests and sometimes we do it.

But in my own mind there is no doubt that a tendency to accede to requests of that kind is an encouragement to careless and slipshod pleading, and may be an encouragement to dishonest pleading. In this particular case, I am very strongly of opinion that we should not accede to the plaintiff's request. I think we should confirm the dismissal of the suit by the trial Court. I agree to the order proposed.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1920 Bombay 67 (1)**

MACLEOD, C.J. AND HEATON, J.

Irbasappa Mallappa Bilehal — Applicant.

v.

Basangowda Fakirgowda Patil — Opponent.

Civil Extra. Appln. No. 94 of 1919, Decided on 26th November 1919, from order of Mamlatdar, Navalgund, in Vahivati Suit No. 11 of 1917.

Civil P. C. (5 of 1908), S. 115 — Summary proceedings—Other remedies open — High Court does not interfere.

The High Court will exercise its powers of revision under S. 115 only if the party applying to the Court has no other remedy, but it will not exercise those powers in a case where the proceedings sought to be revised are purely summary and do not finally decide the dispute between the parties. [P 68 C 1]

B. J. Desai and Nilkant Atmaram — for Applicant.*Jayakar and A. G. Desai* — for Opponent.

Macleod, C. J.—The petitioner sued the opponents in the Mamlatdar's Court at Navalgund for an injunction to restrain them from disturbing and obstructing the petitioner in the possession of the eastern moiety of R. S. No. 21 in the village of Umachagi in the Hubli Taluka of the Dharwar District. The Mamlatdar, relying upon E. tenancy register of the Record-of-Rights and other documentary and oral evidence recorded in the case, found that the petitioner was in actual possession of the land in suit; that the opponents were obstructing him and that such obstruction first commenced within six months before 30th August 1917 when the suit was filed by the petitioner. Therefore the Mamlatdar issued an injunction as had been prayed for by the petitioner. The opponent applied in revision to the Collector of Dharwar under S. 23, Mamlatdar's Courts Act. The Collector took a differ-

ent view of the evidence and held that the opponent Basangowda was the owner of the land in suit. Accordingly he set aside the order of the Mamlatdar and cancelled the injunction.

A rule was granted by Pratt, J., calling upon the opponent to show cause why this order of the Collector should not be set aside. The rule has now come on for argument. In our opinion the Court should be slow to exercise its powers of revision under S. 115 of the Code unless the party applying to the Court has no other remedy. But in a case where the proceedings which are sought to be revised are purely summary proceedings, which did not finally decide the dispute between the parties, then as far as we are concerned, we do not think that we should exercise our powers of revision. The rules are therefore discharged with costs.

Heaton, J.—I concur. Not only have the applicants in these cases a remedy by suit, but that is the remedy which, I very strongly hold, the law intends that they should take.

G.P./R.K.

*Rule discharged.**** A. I. R. 1920 Bombay 67 (2)**

SHAH AND CRUMP, JJ.

Hari Raghunath Patvardhan—Defendant—Appellant.

v.

Antaji Bhikaji Patvardhan and others—Plaintiffs—Respondents.

Second Appeal No. 226 of 1918, Decided on 19th November 1919, from decision of Dist. Judge, Thana, in Appeal No. 189 of 1917.

* Hindu Law—Religious endowment—Temple in ruins—Manager is not entitled to remove image in face of opposition.

The fact that a public temple is in a ruinous condition would not entitle the manager of the temple to remove the image from the temple and instal it permanently in a new building, especially where the removal is objected to by a majority of the worshippers. [P 69 C 1]

G. S. Rao and C. H. Patvardhan—for Appellant.*P. V. Kane*—for Respondents.

Shah, J.—This appeal arises out of a suit brought by certain villagers with leave under O. 1, R. 8, for a declaration that the temple of Ganpati in question was a public temple and for an injunction restraining the defendant from removing the image of Ganpati to another adjoining building put up by him. The

plaintiffs who represented the villagers, alleged that this was an old temple of Ganpati which was not the private property of the defendant, that the defendant was about to remove the image to another building which he had no right to do and which, they alleged, was contrary to their sentiments and religious belief. The defendant pleaded that the temple was a private temple, that he had been in management of the temple for many years, that the temple building was in a dilapidated condition and that he had put a new building on his own land where he wanted to instal the image after removing it from the old temple. He contended in effect that as the manager of the temple he had a right to do so.

The trial Court found that the temple was a public temple, that the defendant was the manager of the temple and that in view of the omission of the villagers to effect the necessary repairs in the old building which was in a dilapidated condition, the defendant was justified in putting up a new building for the location of the image. It was found that the land on which the new building was put up by the defendant belonged to him; but in the course of the proceedings the defendant expressed his willingness to dedicate the land with the building to the temple and agreed to treat the old building and the new building on the same footing as a public temple. The trial Court incorporated this undertaking on the part of the defendant in the decree and refused to grant the injunction which the plaintiffs had prayed for. In appeal the learned District Judge came to the conclusion that the defendant had no right as manager to remove the image from the present temple to the new building. In view however of the fact that the existing temple had fallen into disrepairs, the plaintiffs agreed to deposit Rs. 1,500 with a view to effect the necessary repairs, and a decree on that basis was passed restraining the defendant from removing the image to the new building.

In the appeal before us it has been urged on behalf of the defendant that the plaintiffs have taken up an unnecessarily obstructive attitude and that in view of the fact that he is willing to dedicate the new building to the temple there should be no objection to the image

being installed in that building. On the other hand the plaintiffs urge that the defendant has been actuated by an indirect motive in thus removing the image from its present position to a building which has been erected by him. We are not however concerned in this litigation with the motives of either side. It may be that the defendant had acted only in the interest of the temple in putting up a building on his own land with the intention of removing the image to that building and of duly installing it in that building. It may be that the plaintiffs have not been so far diligent in seeing that the present building was properly repaired and that they may have some animus against the defendant in refusing his offer to dedicate the new building to the temple. We are concerned in this appeal only with the question of law which has been raised on behalf of the defendant that as a manager he is entitled to remove the image and to instal it in the new building. It is common ground now that the existing temple is an ancient public temple. It is also common ground that the defendant has been the manager of this temple for a number of years.

It is not disputed that the existing building is in a ruinous condition and that it may be that for the purpose of effecting the necessary repairs the image may have to be temporarily removed. Still the question is whether the defendant as manager is entitled to remove the image with a view to its installation in another building which is near the existing building. Taking the most liberal view of the powers of the manager, I do not think that as the manager of a public temple he can do what he claims the power to do viz., to remove the image from its present position and to instal it in the new building. The image is consecrated in its present position for a number of years and there is the existing temple. To remove the image from that temple and to instal it in another building would be practically putting up a new temple in place of the existing temple. Whatever may be the occasions on which the installation of a new image as a substitute for the old may be allowable according to the Hindu law, it is not shown on behalf of the defendant that the ruinous condition of the existing building is a ground for practically

removing the image from its present place to a new place permanently. We are not concerned in this suit with the question of the temporary removal which may be necessary when the existing building is repaired. The defendant claims the right to instal it in the new building permanently, and I do not think that as a manager he could do so, particularly when he is not supported by all the worshippers of the temple in taking that step. I am clearly of opinion that the view which the District Judge has taken in this case of the powers of the manager is right and that the decree passed by him under the circumstances is correct. In coming to this conclusion I have not overlooked the fact that in the appeal before us some of the villagers have supported the defendant in the position which he has taken up.

I would confirm the decree of the lower appellate Court and dismiss the appeal.

The appellant to pay the costs of the plaintiffs-respondents. The other respondents who have been added here on the application of Mr. Sathaye must bear their own costs.

Crump, J.—I concur.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 69 (1)

MACLEOD, C. J. AND HEATON, J.

Mir Isub Mir Unus Maldikar and others—Plaintiffs—Appellants.

v.

Isub and others—Defendants—Respondents.

Second Appeal No. 511 of 1917, Decided on 12th January 1920, from decision of Asst. Judge, Ratnagiri, in Appeal No. 300 of 1915.

Mahomedan Law—Succession—Widow sole heir—She takes whole partly as sharer and partly by return.

Where a Sunni Mahomedan dies leaving his widow as his sole heir the widow takes one-fourth of his estate as sharer and the remaining three-fourths by return. [P 69 C 2]

N. V. Gokhale—for Appellants.

B. G. Rao for G. S. Rao—for Respondents.

Judgment.—In this case Abdulla and Allisaheb were two Sunni Mahomedans who owned certain property as heirs of their father in equal shares. Abdulla died in 1888 leaving two widows, Jamalbi and Latifa, and his brother Allisaheb. Under Mahomedan law the widows

would take two annas out of Abdulla's eight annas. Allisaheb would take six annas. Allisaheb died in 1897 leaving a widow Amina. She would succeed, according to Mahomedan law, to the fourteen annas of her husband. It has been argued that she would only be entitled to one-fourth of her husband's estate and, in the absence of sharers, residuaries and distant kindred, the three-fourths would escheat to the Crown. That is not Mahomedan law as we understand it. I may refer to Mulla's Mahomedan Law, 5th edition, where the author deals in a simple manner with the doctrine of "Return." In the illustration of a Mahomedan dying leaving a widow as his sole heir, he says, the widow will take one-fourth as sharer and the remaining three-fourths by "Return." The surplus three-fourths does not escheat to the Government." He refers to *Mohamed Arshad Chowdhry v. Sajidabano* (1) and *Bafatun v. Bilaiti Khanum* (2). It is obvious therefore that the defendants' contention cannot be sustained, and the plaintiff succeeds to the fourteen annas as the heir of Amina. The appeal is dismissed with costs.

G.P./R.K.

Appeal dismissed.

(1) [1877-78] 3 Cal. 792=2 C. L. R. 46.

(2) [1903] 30 Cal. 683.

A. I. R. 1920 Bombay 69 (2)

MACLEOD, C. J. AND HEATON, J.

Desaibhai Jorabhai—Appellant.

v.

Ishwar Jeshing—Respondent.

Second Appeal No. 680 of 1918, Decided on 27th November 1919, from decision of Asst. Judge, Ahmedabad, in Appeal No. 107 of 1916.

Transfer of Property Act (4 of 1882), S. 54—Vendee when entitled to deed stated—Subsequent purchaser though with registered sale-deed but tainted with notice of earlier transfer cannot get preference—Registration Act (1908), S. 48.

Where there is a sale of immovable property without a document which is required to make it effectual at law, and the vendor gives possession to and receives consideration from the vendee, the latter is entitled to get a registered sale deed from the vendor, unless, after the original transaction, a third party has obtained a better title.

Where a person, with knowledge that the property in respect of which he holds a sale-deed has been sold to another person who is in possession and, in spite of this, gets his sale deed registered, his title cannot prevail against the person in possession. [P 70 C 1]

G. N. Thakor—for Appellant.

I. K. Vakil—for Respondent.

Macleod, C. J.—These are companion appeals in two suits which arose out of one Dola Nana selling certain property first to one Desaibhai and then to one Ishwar. The sale to Desaibhai was oral and therefore the property, being worth more than Rs. 100, Desaibhai obtained no title to the property but he got possession, and on whatever ground the suit may have been based, if he had filed a suit to get a registered sale deed, I have no doubt the Court would have made an order compelling Dola to execute a sale-deed in his favour. After the oral sale to Desaibhai, and after Desaibhai had been put in possession, Dola sold to Ishwar. Before the sale deed to Ishwar was registered, Desaibhai put in a petition before the Sub-Registrar stating that he was in possession, and asking the Sub-Registrar to refuse to register the sale deed to Ishwar. Therefore Ishwar had distinct notice of the sale to Desaibhai, and of the fact that Desaibhai was in possession. Therefore there was an obstruction to his getting a good title from Dola, and if in spite of his knowledge that there was that obstruction he got his sale deed registered, it is quite clear that his title cannot prevail against Desaibhai. That question or a very similar one was decided before us in Second Appeal No. 672 of 1917. It may be a question whether the transaction between Dola and Desaibhai must be treated as a sale, or merely as an agreement to sell, the consideration passing and the possession being given. But whether there was an agreement to sell that could be specifically enforced, or a sale without a document which was required to make it effectual at law, it appears to me that if Dola gave possession to Desaibhai and received consideration from him, Desaibhai would be entitled to get a registered sale-deed from Dola, unless after the original transaction a third party had obtained a better title. In this case there is no such third party. So I think that the plaintiff Desaibhai was entitled to succeed in his suit against Dola. Dola must be directed to execute a proper sale deed with respect to the property. The plaintiff Ishwar must fail, and really there is no equity in this case. If there is any equity at all, it exists in favour of Desaibhai who had paid his money for the

property, and spent money on the property, and now has run the risk of losing it, whereas Dola would get the purchase price from two purchasers. The plaintiff Ishwar will not be a loser, because it is expressly provided in the sale deed that if he is obstructed in getting possession under his sale deed, then he can have resort to Dola. The appeal therefore in Suit No. 680 will succeed. There will be a decree for the plaintiff with costs throughout. The appeal by Desaibhai in Suit No. 726 will also succeed, and that suit will be dismissed with costs throughout.

Heaton, J.—The principal fact found is that there was what is called an oral sale of the property in suit by Dola to Desaibhai. In pursuance of this sale Desaibhai was placed in possession of the property and the price was paid, or some arrangement was made equivalent thereto. The first Court held on these facts that Desaibhai was entitled to have a regular sale deed executed. The Court of appeal took the view that because there was no agreement for passing a regular and formal sale therefore Desaibhai was not entitled to obtain a sale deed. What happened was, as I have said, that there was what is called an oral sale. Whether, when this matter was arranged orally between the vendor and the purchaser, the vendor used the expression "I sell," or words equivalent thereto, or used the expression "I agree to sell" does not seem to me to really matter; especially as the form of words used in the conversation between the parties has not been precisely determined. The Court of first appeal decided that it would not order a deed to be executed; not however because it was shown that there was not an agreement to sell, but because it was not shown that there was an agreement to execute a deed. Plainly however there was a contract between them, although it may not have eventually taken the legal shape which the law requires. It seems to me that if we regard it as an agreement by which the vendor let it be understood that he was selling the property, then it may properly be taken to comprise "an agreement to sell." It seems to me therefore that we must not adopt this singularly fine distinction; that if the vendor said "I agree to sell," then he was bound; and if he said "I sell," he was not bound; and

that Desaibhai is entitled to obtain a sale deed from the vendor. The parties made a mistake, they thought that an oral sale was valid, but in legal effect an oral sale is no more than an agreement to sell. The other argument urged is that Dola, the vendor, subsequently sold the same property to somebody else. But it appears that that somebody else had notice that Desaibhai claimed to have bought the property and was in possession of it. The lower appellate Court, it is true, found as a fact on the evidence that this other person had no notice. But quite clearly, as it seems to me, the Judge there was thinking of notice before the execution of the sale deed which Dola passed to this other person. But it appears from the judgment of the trial Court, and it is not here denied, that this other person actually had notice at the Sub-Registrar's office before his document was registered. As we have already held in a previous case, that is a sufficient notice in a case of this kind. I agree therefore that both the appeals should be allowed and an order should be made as proposed by my Lord the Chief Justice.

G.P./R.K.

Appeals allowed.

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MACLEOD, C. J. AND HEATON, J.

Amrit Khanderao Kango — Decree-holder—Appellant.

v.

Govind Ramchandra Chitnis — Judgment-debtor — Respondent.

First Appeal No. 256 of 1918, Decided on 6th January 1920, from decision of 1st Class Sub-Judge, Nasik, in Darkhast No. 264 of 1916.

(a) Decree—Execution—Decree giving advantage to judgment-debtor on some condition—Judgment-debtor making default—Decree is executable as ordinary without any advantage to him.

Where there is a provision in a decree for the benefit of the judgment-debtor and he fails to take advantage of the benefit which is provided for him, he loses that benefit and the decree automatically becomes a decree of the ordinary type which does not offer that benefit.

[P 73 O 1]

(b) Decree—Construction—Decree providing payment of interest every year and principal payable after twenty-five years—On single default of interest principal payable at once—Several defaults made but not taken advantage of—Condition held condoned and

decree-holder only entitled to principal with one year's interest only.

A decree provided for the payment of a certain sum by way of interest every year, and for the payment of the principal on the expiration of 25 years, but if the interest was not paid in any year, then the principal and interest could be recovered at once in one sum. For several years there was default in the payment of interest and both parties continued to believe that the original decree still subsisted. Eventually the decree-holder applied for execution of the decree for principal and interest purporting to take advantage of the last default in the payment of interest:

Held: that the parties must be taken to have mutually condoned and wiped out all previous defaults and that the legal position was that there had been only one default which was the subject-matter of the application and that therefore the decree-holder was entitled to recover the principal and one year's interest.

[P 73 C 2]

G. S. Rao for *W. B. Pradhan* and *J. R. Deshmukh*—for Respondent.

Macleod, C. J.—In this case a decree was passed in favour of the plaintiff on 12th February 1894. It directed that interest should be recovered at the rate of Rs. 262-8-0 per annum before 31st May every year from 1892, and that the principal amount, Rs. 7,001 should be recovered in 25 years. It further directed that if the judgment-debtors obstructed the judgment-creditor in attaching the cash allowance till his principal was paid or obstructed the judgment-creditor in getting his interest every year till the principal was paid or obstructed him in any other way, or if the judgment-creditor did not get the interest every year from the judgment-debtors, the judgment-creditor should recover the whole amount, principal and interest, with interest at 3½ per cent, by sale of the mortgaged cash allowance. The judgment-debtors made default in payment of annual instalments of interest. Execution was taken out, and it appears that Rs. 171-2-6 had been recovered in 1903, and Rs. 165-0-3 in 1908. A darkhast was issued in 1909, but that was struck off without anything being paid. Again, in 1914, the decree having been transferred to the Nasik Court for execution a darkhast was issued, but as no money was lying in the office of the Mamlatdar of Niphad the darkhast was dismissed on 17th July 1914. It was never up to that time suggested that the judgment-creditor was barred from executing his decree because he had not taken advantage of the default clause. The present

darkhast was issued in 1916 praying for execution for the whole amount, principal and interest.

The darkhast was dismissed by the trial Judge on the ground that the principal had not become due, that only three years' interest was recoverable, but that had not been claimed. The Judge said that the parties were at liberty to open the whole contentions again if the judgment-creditor filed a new darkhast, and if it was filed, in the Court's opinion, for a proper amount. The judgment does not appear to be consistent, nor does it appear whether it proceeded on the same argument as found favour with this Court in the case of *Raichand v. Dhondo* (1). It does not seem that the Judge was of the opinion that the judgment-creditor was barred entirely from executing the decree because he had not taken advantage of the default clause. He merely said that the principal had not become due, and it was open to the judgment-creditor to execute for the interest so far as the law of limitation allowed him.

Now, it is quite possible that on the facts of a particular case the judgment-creditor may be barred, if it is considered by the Court that he was barred from executing his decree because on a default being made in the payment of an instalment under the decree, he had not executed for the whole amount within three years under the power given to him by the decree. But I think there may be cases, and I think this is one, where the parties may agree, either directly or indirectly, that although default has been made in the payment of an instalment, still the judgment-creditor would not be bound to execute for the whole amount within the time allowed by the law of limitation. Instead of that it is open to the parties to agree that the instalment should be taken as having been paid, and if future default were made execution should issue for the instalments from the date of such default in arrears. Now this is what appears to have been done by the parties in this case. Execution proceedings were taken from time to time in order to get payment of the instalments of interest directed to be paid by the decree.

It was never suggested, although defaults appear to have been made from the very commencement, that after three

years from the date of first default, as no execution proceedings had been taken for the whole amount, the judgment-creditor was absolutely barred from executing his decree, and up till 1914 the parties proceeded on this footing that the judgment-creditor was executing as far as possible for the instalments, and was not attempting to take advantage of the clause which enabled him to execute for the whole amount, and that was agreed to by the judgment-debtor. Clearly in 1914, it was open to him to take the point that execution was barred absolutely. Instead of doing that, he only took the objection that execution could not proceed because there were no assets in the Nasik Court which could be paid out under the darkhast. Therefore I think it was open in this case to the judgment-creditor to treat all the instalments previous to the last one, before the darkhast of 1916 was issued, as having been paid, and then to consider that the default in payment of the last instalment entitled him to proceed to execute for the whole amount, that is to say, the principal amount and the last instalment of interest which had not been paid. It would then be open to the judgment-debtor to say:

"You have agreed in the past to waive the default clause, and only to execute for the instalments until the 25 years are up when the principal amount of Rs. 7,001 becomes due."

But that contention has not been raised. All that I can gather from the previous conduct of the parties is that it was conceded that the judgment-creditor should not be barred absolutely from executing the decree merely because he had sought to execute the decree for the instalments in arrears. It seems to me that it was open to him after 1914, when continued default in the payment of interest was made, to take advantage of the decree and execute for that instalment which was in arrears and for the principal amount. To that extent I should allow the appeal with costs in proportion. The cross-objections are dismissed with costs.

Heaton, J.—I need not recapitulate the facts which have been stated by my Lord, the Chief Justice. I propose to follow in this case the principle which I set out in my judgment in the case of *Raichand v. Dhondo* (1), that where you have, as in this decree, a provision

(1) [1918] 42 Bom. 728=47 I. C. 313.

for the benefit of the judgment-debtor and where the judgment-debtor fails to take advantage of the benefit which is provided for him, then he loses that benefit, and the decree automatically becomes a decree of the ordinary type which does not offer that benefit. This is not a case of an instalment decree of the usual kind. It provides for the payment of a certain sum by way of interest every year, and for the payment of the principal on the expiration of 25 years, but if the interest is not paid in any year then the principal and interest in one sum are to be at once recovered. So any failure to pay interest for one year would automatically convert the decree into one under which the principal was immediately recoverable. Now in this case, there has been year after year for a long series of years a failure to pay the interest, and therefore it is urged that, many years ago, the decree automatically became one of the ordinary type. The principal, it is urged was then recoverable and limitation has by this time made it quite impossible to recover it.

But it does not follow that because the decree holder is entitled to interest every year therefore he is bound to take it. He may be a generous man and he may forgo it. He may let year after year go by without troubling his debtor about the interest. That would not automatically convert the decree into a decree of the ordinary type. That however is not what has happened in this case. But just as you may have a judgment-creditor generously refraining from taking his yearly interest so you may have the judgment-creditor and the debtor both agreeing that a default shall be condoned, and that the decree shall continue as an instalment decree or a decree of the kind that we have here. My Lord, the Chief Justice, has pointed out circumstances in this case which enable us to arrive at this position. We regard the judgment-creditor and the judgment-debtor as having mutually condoned all defaults prior to the one which is the subject of the particular darkhast. In other words we take it that both agreed, as undoubtedly they both believed, that the decree which still existed between them was the original decree. As I began by saying, I need not detail the facts. No doubt both parties have totally mis-

understood the true legal effect of the decree between them. But equally undoubtedly, they have both treated it as a decree still subsisting in the shape of a decree which requires interest to be paid for 25 years, and thereafter the principal. And although their conduct has been no doubt influenced by mutual misunderstanding of the true legal nature of the decree, yet still we can accept this that they both believed the decree to be still in force between them, and I think that we may also take it that we may accept it as establishing a position equivalent to what would be the true legal position, had they acted similarly with full knowledge of the true nature of the decree. The legal effect is this, that there has been in effect no default at all except the one which is the subject of the darkhast. Every previous default is wiped out. You cannot take it that there has been a default previously which enables the judgment-creditor to claim interest for the previous years, but that this default has not had the effect of automatically converting the decree into one of the ordinary type. If there has been an uncondoned default, then the legal consequences of that default must ensue. Therefore in order that the present darkhast may be acceded to, we must take it that there has been no default whatever except the one which is the subject-matter of this darkhast, and although as a matter of fact many previous defaults have occurred, they are all to be regarded as condoned or wiped out, and we are to deal with this decree as if it had been fulfilled in every particular until the failure to pay that item of interest which led to the present darkhast. That being so, what the judgment-creditor is entitled to is one year's interest and the principal. Therefore, I agree to the order proposed by my Lord, the Chief Justice.

G.P./R.K.

Appeal allowed.

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SHAH AND HAYWARD, JJ.

Rukminibai Krishnarao Tambvekar—Appellant.

v.

Laxmibai Narayan Tambvekar and others—Respondents.

Appeal No. 18 of 1917, Decided on 25th August 1919, from order of Asst. Judge, Satara, in Appeal No. 320 of 1914.

Hindu Law—Gift — Private and absolute gift to Brahmin for maintenance is distinguishable from religious endowment—Condition restricting residence is unenforceable.

A religious gift (agrahar) to a Brahmin for his maintenance is a private and an absolute gift according to law, and is entirely distinguishable from a religious endowment in favour of a deity of a public character, and where such a gift imposes a condition restricting the residence of the donee, and there is no rule of Hindu law necessitating the enforcement of such condition, the condition is opposed to public policy and has no legal effect. [P 75 C 2; P 76 C 1, 2]

G. N. Thakor—for Appellant.

D. R. Patwardhan, Nilkanth Atmaram and J. R. Gharpure—for Respondents.

Shah, J.—The plaintiff in this case sued the defendants to recover a certain sum said to have been wrongfully withheld by defendant 10 and for a perpetual injunction against the defendants, restraining defendant 10 from receiving the dues and defendants 1 to 9 from paying the dues to her in respect of the property in suit. The relief was claimed on the footing that the plaintiff was entitled to the inam rights in the property in suit under a conveyance in his favour, dated 18th September 1911, by one Ramakrishna, who traced his title to the said rights under a deed of gift in favour of his father, dated 13th October 1880. This deed of gift was passed by the members of the Tambvekar family. The gift was described as a 'religious Agra-har Inam.' The land and the house described in the deed were given by way of gift to the donee in these terms:

"So you, your sons and grandsons and succeeding generations should enjoy the said land and house and ground etc., according to the deed of gift, dated the 5th of the Sudha half of Shravan in the Shake year 1801, and should live in peace at the holy place of Markandeya, otherwise known as Mouje Malkhed."

The earlier informal deed of the Shake year 1801 (A. D. 1879) is not forthcoming. It is found by both the lower Courts that the conditions of the gift were the same as the conditions laid down in the document of the year 1799 A. D. executed by the members of the Tambvekar family in favour of several Brahmins in respect of different lands described in detail in that document.

The trial Court found that according to the conditions of the gift the donee was bound to live in the village and that the donee got a

"limited interest, limited to specific purpose and liable to be defeated on Ambekar (the donee) leaving the village of Malkhed and going to reside elsewhere."

It was found as a fact that Ambekar had left the village at the time when he conveyed the property in suit to the plaintiff and that the plaintiff acquired no title as his vendor had no subsisting title at the time of the conveyance. The trial Court accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the District Court, and the learned Assistant Judge, who heard the appeal, found that the donee was bound to fulfil the condition as to residence in the village, and that

"Ambekar had to leave the village temporarily in search of maintenance on account of the hostile attitude of the Inamdars, that his absence from the village under those circumstances is insufficient to prove a positive breach of the conditions of the gift, that he was competent to nominate his successor according to the terms of the gift and that in making the transfer in plaintiff's favour, he (Ambekar) has substantially complied with the conditions imposed by the original donor."

On the basis of this finding the lower appellate Court reversed the decree of the trial Court and remanded the suit for a fresh decision.

Defendant 10 has appealed to this Court from the said order, and it is urged on her behalf in support of the appeal that the finding of the lower appellate Court that there was a substantial compliance with the condition attached to the gift as to residence in the said village should not be accepted by this Court on the ground, first, that the point was not made in the trial Court, and secondly, that it is in effect based on no evidence but is largely conjectural. On the other hand on behalf of the plaintiff it is urged not only that this finding should be accepted as binding in this appeal, but that the finding of the lower Courts that the condition as to residence is good in law and enforceable is erroneous.

The finding of the lower appellate Court as to substantial compliance with the condition laid down in the deed of gift as to residence, assuming that such a condition is otherwise valid, seems to me to be open to the objections urged against the finding on behalf of the appellant; and if the decision of this appeal depended in any way on that finding, I could not have accepted it without a further inquiry.

The principal question of law, which has been argued and which requires a careful consideration, is the question

whether the condition as to residence is valid. In order to appreciate the contentions on either side with reference to this condition, it will be convenient to set forth the important passages from the deed of gift of the year 1799, because it is now common ground that the condition of the gift in favour of Ambekar in 1880 were the same as the conditions laid down in the earlier deed of gift in favour of several Brahmins. It is recited in this deed that originally the village of Malkhed was given in gift to the Tambvekar family by Gopalji Bhonsle in the year 1772 on the occasion of a solar eclipse. In the year 1799 the members of the Tambvekar family made a gift to several Brahmins, and we find the following recitals in that deed :

"At that time our Vadil desired to build houses and give them to Brahmins in the name of God as Agrahar (gift). Therefore, houses were built at that place and you all Brahmins were installed and gifts of land were given to you to help you in your maintenance. Since then some changes have occurred on account of the management. In consequence of the same the writing is given to you for vahivat."

Then after describing the names of the donees and the extent of the land given to each one of them and after referring to certain letters which were originally received by the Tambvekars and given over to the donees it provides as follows:

"In all fourteen letters were obtained by the Vadil in his name. I have given to you, all the Brahmins, these and this deed of gift passed by me and have established you ; you and your descendants, i. e., sons and grandsons, etc., should enjoy the said lands and reside in the respective dwelling houses and perform the sixfold religious duties viz., performance of the Sandhya worship at twilights and in the afternoon and take care of the Agrahar and live in peace None of these persons (donees) should abandon his house and go to another place and enjoy his Vritti given to him in connexion with the Agrahar from that place. In case any one of them wished to leave the said village and live elsewhere he should substitute in his place a Brahmin equally learned and who has a large family and who is approved by all and should hand over to him the house and the Vritti and pass to him a writing in his name and approved by all. We have given to you these houses and Vrittis of our free will and pleasure. You should therefore enjoy the same and remain in peace. If any one of you has to go out, (you can go) after having got nothing to do (with the Agrahar). If instead of acting in this manner any one through obstinacy live at another place and desire to enjoy the income of the Vritti in connexion with the Agrahar relying upon his own strength or upon the strength of other persons, his conduct shall be considered an act of irreligiosity and the whole body of Brahmins resid-

ing at the Agrahar should appoint another Brahmin who is learned and is a man of large family and hand over to him the house and the Vritti (of the man who may go) and pass to him a writing in the name of all the Brahmins and establish him. This danpatra (i. e. deed of gift) is given having been approved by all. Nobody should cause any obstruction to this act of charity."

And then follow a number of verses pointing out to the successors of the donors the merit of preserving the gift and of not disturbing it in any way. It is an earnest appeal to the descendants of the donors to see that their act of charity was upheld by their successors. It is needless to quote any of these verses cited in the document pointing out the merit of allowing the gift to continue.

It is urged on behalf of the appellant that the condition as to residence in the village attaching to the gift has been explicitly mentioned in the document, that the gift must be taken to be subject to that condition and that the donees and their successors are bound to fulfil it. Both the lower Courts so far have decided in favour of the appellant's contention. On a careful consideration of the arguments urged on both sides with reference to this point which is important and difficult, and the terms of the document. I have come to the conclusion that this Agrahar gift is a private gift to the donees and absolute gift according to law and that the further provision as regards the residence in the same village is only a recommendation and an appeal to the religious conscience of the donees and their descendants, and that as a condition it is not valid and enforceable in law. The words of the gift are: "you and your descendants, i. e., sons and grandsons, should enjoy the said land and reside in the respective dwelling houses," the corresponding words in Marathi being *Tumhi wa tumche puttrapautradi wanshparamperenen apalya ghrihin rahun sadrahu jaminicha upbhog ghene*. These words by themselves would indicate an absolute gift. It is doubtless described as an Agrahar gift. The dictionary meaning of the word Agrahar in Sanskrit is "grant of land given by Kings (to Brahmins) for maintenance" and in Marathi "villages or land assigned to Brahmins for their maintenance." The word indicates that it is a religious gift to a Brahmin for his maintenance. No idea of any limitation upon the absolute

character of the gift is necessarily involved in the meaning of the word. In effect it is a private gift to a Brahmin and is entirely distinguishable from a religious endowment in favour of a deity of a public character. The words of the gift must therefore in my opinion be allowed to have their natural scope and cannot be understood to have any limited meaning simply because the gift is an Agrahar gift. The clauses in the deed relating to the necessity of the donees residing in the same village, in my opinion, amount to no more than an expression of a pious wish on the part of the donors to see that the donees fulfilled the purpose of the gift by staying in the village and by living the ceremonial life of a Brahmin. This is indicated by the provision in the document that if anyone through obstinacy or through any other reason fails to live in the village, it shall be considered an act of irreligiousness, and the whole body of Brahmins residing in the village should appoint another Brahmin in his place. It is contended on behalf of the appellant that the provision in the document, that the other Brahmins would have the right of appointing a substitute equally learned and of large family in case the condition as to residence is not fulfilled, indicates a legal right vested in the other Brahmins living in the village and that as a condition it is valid and ought to be enforced. On the best consideration that I can give to the question I have come to the conclusion that it is really an absolute gift and that the further provision in the document relating to the residence is in the nature of a recommendation to the donees. The consequences of non-observance of this direction are purely religious, and we are not concerned with the gravity of these consequences. That is a matter for the donees to consider.

This view is further strengthened, in my opinion, by the fact that there is an earnest appeal to the successors of the donors to see that the gift is not in any way disturbed. According to Hindu law a religious gift is not revocable. The last verse of Yajnavalkya with Vijnanesvara's commentary thereon in the chapter on "resumption of gifts" clearly emphasizes this point: see Gharpure's Translation of the Mitakshara, Vyavahara Adhyaya, pp. 313—316. Though the appellant maintains that she does not wish to revoke

the gift, her attitude does involve that result in a sense.

But taking it that she only means that the donee, who fails to fulfil the condition as to residence, loses his right to the property and that the right for the disposal of the property in favour of a fit substitute is vested under the deed among the other donees in the village fulfilling the condition as to residence, the condition as to residence seems to me to be not valid in law. It imposes not only upon the donees but upon their sons and grandsons and descendants in perpetuity the obligation not to leave the village without forfeiting the gift. Such a condition seems to me to involve a very serious restriction upon the enjoyment of the property, and should not be enforced, unless there is any special rule of Hindu law necessitating its enforcement. No such rule has been referred to in the argument before us, and I am not aware of any such rule. The enforcement of such a condition appears to me to be opposed to public policy; and it seems to me to be in consonance with the general spirit of Hindu law to hold that the gift is absolute and the words of restriction as to residence have no legal effect.

The provisions of the Transfer of Property Act have no direct application to this case. But it may not be inappropriate to refer to S. 11, for that Act, as indicating that such a serious restriction upon the ordinary enjoyment of the property given by way of gift cannot be treated as valid, apart from any special rule of Hindu law validating such a restriction.

The only reported case relating to an Agrahar gift cited before us is *Anantha Tirtha Chariar v. Nagamuthu Ambalagaren* (1). This was a case of an Agrahar gift and the condition considered by the Court in the case related to the restrictions against alienation. The judgment delivered by Muttusami Ayyar, J. shows that the condition imposing a restriction on alienation was held to be invalid; that the Agrahar gift was treated as a gift with a religious motive; and that the grant was held not to stand on the same footing with a religious endowment. The point of importance is that the restriction as to alienation was held to be bad according to the ordinary rule of law, even though the grant was an Agrahar

(1) [1882] 4 Mad. 200.

grant. It is true, as pointed out by the learned pleader for the appellant, that in that case the condition laying down the restriction against alienation was not inserted in the deed of gift, but was to be found in a contemporaneous separate document, and that the decision in terms refers to that circumstance. I am however unable to accept this fact as affecting in any way the ratio decidendi of that case relating to the application of the rule for not enforcing restrictions against alienation to an Agrahar gift. In that case the learned Judges did not decide the question as to whether the grant was subject to residence in the Agrahar and to the study of religious books, as it did not arise in that case. In the present case the question as to the validity of the condition relating to residence does arise; and it seems to me, having regard to the decision in that case, that that condition could not be treated on any footing other than that on which the condition relating to restrictions against alienation was treated. Though in terms the condition as to residence does not involve any restriction against alienation, it seems to me that it is a condition of the same nature and that indirectly it involves a restriction upon the power of alienation. On a construction of the document in question I have come to the conclusion that the condition as to residence is not enforceable and that view seems to me to derive support from the decision in *Anantha Tirtha Chariar's* case (1).

I am therefore of opinion that the order of the lower Court reversing the decree of the trial Court and remanding the suit is correct, though on different grounds.

In the view I take of the condition as to residence it is not necessary to examine the finding of the lower appellate Court as to whether the condition has been duly fulfilled by the donee in question.

I would affirm the order of the lower appellate Court and dismiss the appeal.

The appellant to pay the plaintiff respondent's costs of this appeal. The other respondents will bear their own costs.

I would make the same order in the other appeal (No. 20 of 1917) from order.

Hayward, J.—I agree. The Agrahar grant by the original deed of 1799 included these terms:

"I have given to you, all the Brahmins, this deed of gift and have established you; you and your descendants, i. e., sons and grandsons, etc., should enjoy the said lands and reside in the respective dwelling houses and perform the six-fold religious duties and should dwell in the village. None of these donees should abandon his house and go to another place and enjoy his Vritti given to him in connexion with the Agrahar. In case any one of them wishes to leave the said village and live elsewhere, he should substitute in his place a Brahmin equally learned and who has a large family and who is approved by all, and should hand over to him the house and the Vritti. We have given to you these houses and Vritti of our free will and pleasure. You should therefore enjoy the same and remain in peace. If any one of you has to go out, you can go after having got nothing to do with the Agrahar. If, instead of acting in this manner, any one through obstinacy live at another place and desire to enjoy the income of the Vritti in connexion with the Agrahar, his conduct shall be considered an act of irreligiousness and the whole body of the Brahmins residing at the Agrahar should appoint another Brahmin and hand over to him the house and the Vritti."

One Ambekar obtained what has been taken to be, a re-grant of these rights in 1888, and he enjoyed the proceeds of the property up to 1899. He left the village in 1904 and sold his rights in 1911. The plaintiff, who purchased them from him, brought this suit in 1912 to recover the property as private property. The defendant objected as the successor of the grantor that he was not entitled to do so, as the grant had been forfeited by his vendor having left the village contrary to the terms of the grant. The question therefore to be decided was this: whether the condition as to residence in the village was a restriction on the grant which was valid in law.

There is unfortunately an absence of authority as to what an Agrahar grant exactly is. The question therefore before us is one of considerable difficulty. But it would appear that such a grant is a grant given for private religious purpose, and there would not appear to be authority for holding that a necessary part of such a grant was the grantee residing upon the property. This appears not inconsistent with the recited terms of this grant. It was an absolute grant to "you and your descendants, viz., sons and grandsons." It was no doubt thereafter stated that the grantee should not abandon his house and that if he did, another should enjoy the Vritti. But there was no express clause that in such a case the grant should be forfeited to the grantor

The penalty was on the contrary stated to be, what from a religious point of view would no doubt be a heavier penalty, the penalty of being branded as irreligious and of having another person appointed to his place by the other Brahmins. If this is the true interpretation of the grant as a private religious grant, then the condition as to residence would not be binding, but would have to be regarded as no more than a pious wish expressed by the grantor, similar to such wishes held not to be binding in wills. But it seems to me that even if the condition could be placed on a higher level than this, it would not be binding. It would offend against the general rule of law that where an interest is created absolutely in favour of any person, but the terms of the transfer direct that such interest should be enjoyed by him in a particular manner, that person shall be entitled to receive such interest as if there were no such direction. This general rule would apply in default of any special rule of Hindu law by reason of Ss. 2 and 11, T. P. Act. The general rule was applied to the Agrahar grant in the case of *Anantha Tirtha Chariar v. Nagamuthu Ambalagaren* (1) by the Madras High Court, and no other case has been quoted before us nor has reference been made to any special rule of Hindu law.

It has been said that grants for pious purposes might be accompanied by conditions such as that the donor should be maintained by the donee during his lifetime, and that his exequial ceremonies should be performed after his death, that the donee should defray expenses of the worship of the idol, and that the property should pass to another in a particular event, yet provisions which are repugnant to the nature of a grant, such as restraint upon alienation or partition, would be invalid, and where the gift is in itself good, conditions which are repugnant are ineffectual, but the gift itself remains good. These remarks are quoted from para. 375, Edn. 8, Mayne's Hindu Law. It is true that the general rule applied in the case of *Anantha Tirtha Chariar v. Nagamuthu Ambalagaren* (1) was that against a condition restraining alienation prescribed by S. 10 and not that against the unrestrained enjoyment of property prescribed by S. 11, T. P. Act. But it seems to me that

the reasoning which was applied to the one rule would equally apply to the other, and that if a restriction against alienation were invalid under S. 10, equally so would a restriction against the full enjoyment of the property be invalid under S. 11, T. P. Act. That decision would also support the view that a grant of this particular nature should be regarded as one for private religious purposes and would not stand on the same footing as a public religious endowment. Considerations of a different nature would apply to the latter, and it might in such a case be possible to enforce restrictive terms in a regular suit under S. 92, Civil P. C.

It seems to me therefore that the view taken of this matter was incorrect both in the original and appellate Courts. There seems to me also serious difficulties in the way of the view, that the condition as to residence had not been broken, taken by the lower appellate Court. But it is not necessary to discuss further this latter view, as the remand order must, in my opinion, be upheld upon the particular view of the law relating to such grants for religious purposes taken by this Court.

G.P./R.K.

Order affirmed.

A. I. R. 1920 Bombay 78

CRUMP, J.

Uderam Premasukh—Plaintiff.

v.

Shivbhajan Rampratab—Defendant.

Original Civil Suit No. 481 of 1919,
Decided on 29th March 1920.

Contract Act (9 of 1872), Ss. 133 and 134
—Contract of sale of certain quantity of cotton at fixed rate and for particular delivery—Defendant surety vendor—Subsequently another contract entered by purchaser to sell same goods at higher rate—Second contract held independent and surety held not discharged on first contract.

Plaintiff entered into a contract with a firm to purchase a certain quantity of cotton at a particular rate and for a particular delivery, and the defendant as surety guaranteed the performance of the contract. Subsequently the plaintiff entered into another contract with the same firm to sell to it the same quantity of cotton at a higher rate and for the same delivery. Before the date of delivery the firm became insolvent and the plaintiff brought the present suit to recover the difference between the rates of the contracts. The defendant pleaded that by reason of the second contract he was discharged from his suretyship.

Held: that the defendant was liable, as each of the contracts was capable of performance on the due date and the second contract did not amount to a rescission of the original contract.

[P 80 C 2]

Kanga and Jinnah—for Plaintiff.

M. Mehta and Munshi—for Defendant.

Judgment.—This is a suit to recover from defendant as surety on a guarantee. The facts are simple and are not in dispute save in one minor particular, that is, as to the service of notice of demand, which point was ultimately abandoned as being immaterial to the result. Those facts are shortly as follows. On 30th May 1917, plaintiffs agreed to buy 100 bales of cotton, April 1918 delivery at Rs. 406-12-0 from the firm of Balmukund Premsookh. Defendant as surety guaranteed the performance of the contract. On 3rd February 1918 plaintiffs, being uneasy as to the financial soundness of Balmukund Premsookh, agreed to sell to them 100 bales of the same goods for the same delivery at Rs. 617-8-0. On 4th February Balmukund Premsookh became insolvent. Plaintiffs' claim against them has been paid in part by the Official Assignee. In the present suit they seek to recover the balance from defendant. It is admitted that the market rate on the Vaida day was Rs. 712. Plaintiffs put their case alternatively. They say;

"Either we are entitled to recover the difference between the rates of the two contracts, or the difference between the rate of the first contract and the rate on the Vaida day."

A number of defences were suggested in the written statement, but these were dropped at the hearing. The defence taken is that defendant is discharged from his suretyship by reason of the second contract between the plaintiffs and the principal debtor.

The following issues were raised:

(1) Whether plaintiffs are entitled to recover Rs. 10,507-8-0 from the defendant?

(2) Whether the first contract remained outstanding until the due date as alleged in para 7 of the plaint.

(3) Whether plaintiffs in the alternative are entitled to claim Rs. 15,262-8-0 or any other sum from the defendants?

(4) Whether defendant is not discharged from his suretyship as set out in para 4 of the written statement?

The result of elaborate arguments in this case has been to confirm the conviction with which I set out that the only question to be decided is whether both the contracts remained alive and capable of performance until the due

date. The matter may readily be put from either point of view. On the one hand it may be said that there are two separate and independent contracts, one of sale, and one of purchase, each legally subsisting until the due date, and legally capable of being enforced. On the other hand it may be argued that taking the two contracts together, the intention of the parties was to enter into a new agreement to pay the difference at the due date. From the first point of view the surety is not discharged; from the second point of view the surety is discharged.

So far as I am aware there is no authority upon this point. As between the parties themselves it could not in practice arise, for whatever their exact legal rights may be it is plain that they do not intend that there shall be any delivery, but that the sum settled by what may for convenience be termed the "cross-contract" shall be paid by one to the other. That is no doubt the point of view of the business man, and it is ordinarily permissible to speak of such contracts as "cancelling each other." An instance of the use of this phrase will be found in *J. H. Tod v. Lakhmidas Purshotamdas* (1). Farran, J., speaking of such contracts says:

"This mode of dealing, when the sale and purchase were to and from the same person, of course had the effect of cancelling the contracts, leaving only differences to be paid."

The learned Judge was in that case dealing with a defence of wager, and the question of the intention to deliver was, therefore all important. The point here is different, viz., whether the contracts mutually extinguish one another. The case of *Sassoon v. Tokersy* (2) has also been cited, but there is little in that case which assists the decision here. The most relevant part of the judgment is that which points out the possible difference between the legal point of view and the "business" point of view (see p. 624). That difference must be remembered, and it is for this reason that in the present case the subsequent conduct of the parties is of little importance. All that they had to consider was the practical result which undoubtedly was that differences only would be paid. The extracts from the accounts which have been put in show no more than that as business men

(1) [1892] 16 Bom. 441.

(2) [1904] 28 Bom. 616=6 Bom. L. R. 521.

they regarded the transactions as settled and that all that remained to be done was to pay or receive the difference on the due date. This however is not conclusive. There is a distinction between the legal "rights created by the contracts and the mode in which those rights may subsequently have been dealt with" (see the case last cited at p. 625).

We have here two contracts. On the face of them they are wholly independent. Each continues in full force and effect until it is discharged. Can it be said that the second contract extinguished the first and in so doing was itself extinguished? It seems to me that the true view is rather that each was capable of performance on the due date. Each party had a right to demand delivery from the other, but as the quantities are equal, the practical result must have been that there would be no delivery. This was a necessary consequence of the two contracts. It was their combined effect, but there was no novation in the sense in which the term is used in S. 62, Contract Act.

Ordinarily no doubt the best guide to the meaning of a contract is the common intention of the contracting parties: but that intention can be gathered only from that which is expressed. Here there are two distinct contracts of different dates. Each is complete in itself and free from ambiguity or obscurity. It is not even suggested that the parties by any outward expression agreed to treat them as forming by their combined effect a third contract superseding both. Therefore in law no evidence can be admitted varying the terms of either of these contracts. There is "no distinct subsequent oral agreement" rescinding the first contract [cf. S. 92, Evidence Act, Proviso (4)]. No one even alleges that there are any materials but the contracts themselves and the subsequent conduct of the parties from which the legal position can be gathered. The subsequent conduct does no more than recognize the practical result. But *prima facie* persons who enter into contracts must be supposed to contemplate performance. The payment of differences is no more than the necessary result of any attempt to insist on the performance of both contracts. If the procedure of tendering the price against the goods and the goods against the price were solemnly enacted, the

result clearly would be that the advantage of the one party over the other would be measured precisely by the difference between the contract rates. It is therefore in my opinion, unsound to argue that because the parties had in mind the payment of differences only the two contracts were extinguished. The truth is that the practical mind immediately perceives the practical result of the operation of the two contracts, and confines its attention to that.

Unless it can be held that there was a rescission by a new agreement, how were these contracts discharged? It is a case of a new agreement or nothing. The contracts are in precisely the same form; each is complete in itself and each is on the face of it capable of being enforced on the due date. It has been questioned whether a suit would lie on the earlier contract. This is merely putting the question in another form. To a suit on either of these contracts two answers could be made first that the contract was extinguished. Secondly, that the claim due under the other contract should be set off. The latter represents, in my opinion, the true position. The practical result would of course be that differences only could be awarded.

I have already indicated that upon the view which I have taken, the surety is not discharged. The relevant sections of the Contract Act are Ss. 133 and 134. The former does not operate here, the reason being that there is no variance in the terms of the first contract. As to S. 134 the principal debtor is not released, nor is the legal consequence of the act of the creditor that the principal debtor is discharged. The decisions cited do not carry the matter beyond the words of the Statute which require no comment.

The result therefore at which I have arrived—not, I admit without considerable doubt—is that defendant remains liable on his guarantee. The logical consequence would be that he is liable to pay the plaintiff damages calculated on the difference between the rate of the contract and the rate on the due date. But as the plaintiff asks for a decree for the lesser sum only, viz., the difference between the rates of the two contracts, there will be a decree for that sum only.

I record the following findings:

1. In the affirmative. 2. In the affirmative. 3. In the negative. 4. In the negative.

Decree for plaintiff for Rs. 8,078, costs and interest on judgment at 6 per cent.

G.P./R.K.

Suit decreed.

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MACLEOD, C. J. AND HEATON, J.

Natvarlal Maneklal — Defendant 1—Appellant.

v.

Bai Chanchal—Plaintiff—Respondent.

Second Appeal No. 563 of 1918, Decided on 28th November 1919, from decision of Dist. Judge, Ahmedabad, in Appeal No. 295 of 1916.

Hindu Law—Widow—Compromise—Compromise by, prejudicial to reversioners held not binding on reversioners after her death.

A decree based upon a compromise entered into by a Hindu widow without due regard to the interests of the reversioners in a suit respecting her husband's estate becomes void and inoperative after her death, and is not binding on her daughter or other heirs. [P 82 C 1]

Jayakar and *G. N. Thakor*—for Appellant.

G. S. Rao—for Respondent.

Heaton, J.—We are here dealing with a matter similar to that which has on several occasions been before a Bench of this Court. A Hindu widow brought a suit, and her allegations were that her deceased husband, and her husband's brother, originally joint owners of the family estate, had separated and divided that estate, and the widow sued to recover her husband's share. If the allegations in the plaint were true, the family property would have had to be ascertained and what practically amounted to a fresh partition would have had to be made. But however that may be, the nature of the suit is quite plain. The plaintiff in the suit was a widow. She maintained that her husband and his brother had separated in estate, and she claimed to recover her husband's share. She had a daughter named Chanchal, no son, and consequently the daughter was the nearest reversioner at that time to whatever might prove to be the widow's deceased husband's estate. The original defendant in that suit was the son of the husband's brother. Eventually the suit was compromised, and by this compromise the entire property went to the defendant in that suit, that is to say, passed away from the widow but the

widow was to have a maintenance of Rs. 115 a year for life, and after her death her daughter was to have maintenance at Rs. 30 a year for her life. The daughter was not a party to the suit, and when a reference was made to arbitration, the daughter did not sign that reference, nor is it found as a fact that she practically assented to the reference and took part in it, although it is found that she was aware of it.

Chanchal, the daughter, has now brought this suit to have it declared that the decree in the earlier suit based on the award is void and inoperative after the death of her mother, defendant 6. The controversy involved in this suit is partly a matter of fact, partly a matter of law. The salient facts are those I have stated and as to them there is not now any dispute. The first Court decided in plaintiff's favour and made the decree asked for. Certain of the defendants appealed. The appeal was dismissed. The Judge in appeal held that apparently in no circumstances could an award decree of the kind we have here be binding on the reversioner unless the reversioner was a party to the suit and to the reference to arbitration. Now that as a statement of law is, I think, erroneous. We have in the judgments in *Rama Santu Randive v. Daji Naru Randive* (1) a fairly clear statement of what my learned brother Hayward and myself think on this question of the extent to which the decree in such a suit to which a widow is a party binds the reversioners. In my judgment in that case I called particular attention to the danger of the widow's interest being overridden where she comes in a litigation into conflict with a near agnate of her deceased husband, and I had in mind in that case the inherent danger of accepting as fair, compromises, or even awards, after reference to arbitration in which one of the parties is a widow and the other a near agnate relative of her deceased husband. But though I think that the Judge in the Court below was wrong in the general expression that he gave to the law on this point, I think in the circumstances disclosed in this case that the decision of the lower appellate Court must be upheld.

We have here several of the most significant facts which go to make a Court

(1) [1916] 48 Bom. 249=48 I. O. 126.

hesitate to accept an award as fulfilling the conditions which the Privy Council indicated in *Shivagunga's* case [*Katama Natchiar v. Rajah of Shivagunga* (2)], and we have also a finding that in reality the property had been divided by the brothers, and that the widow was actually entitled to take her husband's share, which would on the widow's death pass to the next reversioner. So though the award might be good as regards the widow herself, because it settled the litigation, yet when we come to think of the reversioner's interest, we find that all that she obtained was a maintenance allowance of Rs. 30 a year which is really very little better than nothing at all. So in the circumstances of this case I cannot reconcile it with either law or justice that the award decree should be upheld as against the present plaintiff, and I think the declaration granted by the trial Court and confirmed by the Court of first appeal is appropriate to the case. It is a declaration that the decree in Regular Suit No. 61 of 1910 based on an award is void and inoperative after the death of defendant 6, that is the mother of the plaintiff, and that it is not binding on the plaintiff, or her heirs, and I think this appeal should be dismissed with costs.

Macleod, C. J.—I concur.

G.P./R.K.

Appeal dismissed.

(2) [1861-63] 9 M. L. A. 539=2 W. R. 31=1
Suth. 520=2 Sar. 25=19 E. R. 843 (P. C.).

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MACLEOD, C. J. AND HEATON, J.

Shankar Dhonddev and others—Defendants—Appellants.

v.

Yeshwant Raghunath Gaitonde and others—Plaintiffs—Respondents.

Cross-Appeals Nos. 22 and 242 of 1919, Decided on 20th January 1920, from decision of Dist. Judge, Ratnagiri, in Appeals Nos. 139 and 150 of 1914.

Transfer of Property Act (4 of 1882), S. 60—Stipulation that if money is not paid after certain period property will be deemed foreclosed is clog—But mortgagor can subsequently enter into separate arrangement for satisfying mortgage—Agreement being independent of contract held not to be clog.

It is a principle of equity that a mortgagor can be relieved from any clog which has been placed on the equity of redemption. Therefore if the original document of mortgage contains a clause that if the mortgage money is not repaid at the end of the mortgage period, the mortga-

gor should be foreclosed, that clause would not be specifically enforced against the mortgagor, and he would still be entitled in spite of it to redeem. But there is nothing to prevent the mortgagor and mortgagee from coming to an arrangement after the mortgage has been executed whereby the mortgage is paid off.

Where a mortgage-deed provided that if after the lapse of 20 years the mortgage-debt should not be paid off, then half the mortgage property was to become the absolute property of the mortgagee, and the other half was to return to the mortgagor as his absolute property free from the mortgage, and considerably more than 20 years afterwards the parties entered into an agreement whereby half the property went to the mortgagee as owner and the other half was obtained by the mortgagor free from the mortgage:

Held: that the agreement, being a transaction independent of the mortgage, could not be held invalid as a clog upon the equity of redemption. [P 83 C 1]

A. G. Desai—for Appellants.

Coyajee and P. B. Shingne—for Respondents.

Macleod, C. J.—The plaintiffs filed this suit for accounts and redemption under the Dekkhan Agriculturists' Relief Act. The lower appellate Court passed an order that the plaintiffs should redeem 7-12ths of the entire property as described in Exs. 79 and 77 free of all encumbrances. The defendants-mortgagees have appealed with regard to certain property contained in the mortgage-deed of 1840 passed by the plaintiffs' ancestor. That mortgage was for a period of 20 years, and it was provided that if the money was not paid off at the end of 20 years, half the property should be taken by the mortgagor and half by the mortgagee. The mortgage money was not paid off at the end of 20 years, and the mortgagee remained in possession until 1864, when a document was passed by the mortgagor, which is Ex. 76. That refers to the agreement in the mortgage of 1840, and effects a transfer of half the property to the mortgagee, and brings back into the ownership of the mortgagor the other half free of all encumbrances.

Now in this suit, which is filed in 1912 the plaintiffs wish us to hold that the arrangement which was arrived at in 1864 is not binding on them, and that they could redeem the property which was retained by the mortgagee under Ex. 76. We have been referred to the decision in *Kanhayalal v. Narhar* (1). In that case the learned Judge referred to

(1) [1903] 27 Bom. 297.

the case of *Lisle v. Reeve* (2) and no doubt the principle laid down in that case should be followed by a Court of Equity. It is a principle of equity that a mortgagor can be relieved from any clog which has been placed on the equity of redemption. Therefore if the original document of mortgage contained a clause that if the mortgage money was not repaid at the end of the mortgage period, the mortgagor should be foreclosed, that clause would not be specifically enforced against the mortgagor, and he would still be entitled in spite of it to redeem. But there is nothing to prevent the mortgagor and mortgagee from coming to an arrangement after the mortgage has been executed whereby the mortgage is paid off. Vaughan Williams, L. J., in the case I have cited said that:

"it was competent for a mortgagee to enter into an agreement to purchase from the mortgagor his equity of redemption. The only objection to such an agreement is, that it must not be part and parcel of the original loan or mortgage bargain. But there is nothing to prevent that being done by an agreement which in substance and in fact is subsequent to and independent of the original bargain."

Now it has been argued that this agreement, which was arrived at in 1864, was part and parcel of the original mortgage transaction effected in 1840, and in that argument of the respondent, we think, can be discerned the fallacy in the case and in the judgment in appeal. If at the end of the period in 1860 the mortgagor had failed to repay the mortgage, and the mortgagee had disputed the mortgagor's right to redeem, the Court would not have allowed that to be done. It would have been still open to the mortgagor to ask the Court to enable him to redeem. But if he chooses to enter into an agreement several years later with the mortgagee whereby the mortgage transaction is closed, whereby he gets back, free of his mortgage debt, half the mortgaged property, while the remaining half remains with the mortgagee, then I do not think any Court of Equity would allow the mortgagor to re-open such a transaction. No doubt the terms of the agreement in 1864 and the deeds of sale in the transaction are identical with what was agreed to in 1840, and it is argued that on account of that it cannot be said that the agreement of 1864 is independent of the original bargain. I

cannot agree with that argument. I cannot see any reason why the parties should not be allowed to come to the agreement, which, as a matter of fact, they did in 1864, as perfectly free agents. If the mortgagee sued for specific performance of the agreement of 1840, and asked for foreclosure, then that would have been an entirely different matter. It appears to me that this agreement in 1864 was not only subsequent, but also independent of the original bargain, and therefore in my opinion, this appeal succeeds, and the plaintiffs cannot redeem any portion of the property which was mortgaged in 1840 and transferred to the mortgagee in 1864. The case of *Ramji v. Chinto* (3), which was referred to in *Kanhayalal v. Narhar* (1), does not touch this point with which I have been dealing. That no doubt did give effect to the general principle of equity that:

"where an instrument of mortgage, though in terms it transfers an estate on failure to repay the mortgage money on a fixed day, yet appears clearly to have been entered into by parties for securing the repayment of a loan, the mortgagor, making the security subservient for the purpose for which it was created, may in equity and good conscience redeem the property by paying off the principal debt and the interest though the stipulated time for payment had been allowed to pass by."

No one disputes that, and the judgment I have delivered is no way contrary to the principle which is given effect to by that decision.

The only point argued in Appeal No. 242 of 1919 is whether the lower appellate Court correctly interpreted Ex. 80. It held that it could not be considered as an acknowledgment of the mortgage created in 1839 by Balaji Hari of his one-third share in eight annas by Ex. 78. No doubt that document does refer to a certain share mortgaged with Karande by the plaintiffs. But we know that there had been a number of mortgages. It is impossible to hold that this is an acknowledgment of a particular mortgage passed in 1839, when there is no specific reference to that mortgage, and, therefore Appeal No. 242 must be dismissed with costs. As defendants have succeeded throughout, they will get costs throughout in Appeal No. 22, which is allowed as to that part of the claim which was valued at Rs. 250.

Heaton, J.—The Judge in the Court below considered that he was bound by

(3) [1862-65] 1 B. H. O. R. 199.

(2) [1902] 1 Ch. 53=71 L. J. Ch. 42=85 L. T. 464=50 W. R. 231=18 T. L. R. 61.

the decision in *Kanhayalal v. Narhar* (1). But a little consideration shows that that case is no authority whatever for the present. There was indeed a very similar mortgage-deed which provided very much the same as the present deed which we are concerned with here. The provision in the deed before us is that if after the lapse of 20 years the mortgage debt should not be paid off, then half the mortgaged property was to become the absolute property of the mortgagee and the other half was to return to the mortgagor as his absolute property free from the mortgage. In *Kanhayalal's* case (1) it was held, as I understand it, and also as I believe correctly, that the mortgage-deed would not automatically bring about the arrangement stated, at the end of the stated number of years. It would not do that, because the stipulation in the mortgage-deed would be regarded as a clog on the equity of redemption, and, therefore, as inoperative. In the case we are concerned with, however, the parties evidently did not suppose that the clause or stipulation in the mortgage deed would itself automatically effect its purpose because in 1864, i. e., 24 years, not 20 years, after the date of the mortgage, they accomplished what it had previously been arranged should be accomplished, in a proper and legal way by a registered document.

There is only one possible ground on which, as far as I can see, that registered document can be declared to be of no effect, and on which it can be held that the Court must proceed exactly as if it had never been executed. It is this: that there is some legal objection to parties actually doing what they had undertaken to do, so long as they could not be compelled to do it. It is perfectly true that the mortgagor could not have been compelled to assent to what was done in 1864, even though the mortgagee had pointed out the provision in the mortgage bond. But there are thousands of lawful transactions entered into by people of their own free will, which they could not be compelled to enter into, and it seems to me to be no reason whatever against the validity of the transaction of 1864 that it was one which the mortgagor could not have been compelled to assent to. That, I think is all that I need say in this case. It seems to me to be about as clear a case as one

could have of a perfectly valid and honest transaction, and I think undoubtedly the trial Court was right, and that the Court of first appeal was misled by its belief that the matter was settled by the authority of *Kanhayalal's* case (1). I agree to the order proposed.

G.P./R.K.

Appeal allowed.

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MACLEOD, C. J. AND CRUMP, J.

Vasudeo Ganesh Joshi—Defendant—Appellant.

v.

Anupram Haribhai Trivedi—Plaintiff—Respondent.

Second Appeal No. 222 of 1918, Decided on 18th December 1919, from decision of Joint Judge, Poona, in Appeal No. 133 of 1915.

Contract Act (9 of 1872), S. 23—Contract to prepare and supply copies of picture produced in England is not void.

As soon as an author, a publisher or a painter gives to the world what he has written or created, it becomes public property and there is no right at Common law which protects him from his works being copied by any one who chooses to do so. A contract therefore to prepare and supply copies of a picture produced in England does not come within S. 23. [P 85 C 1]

Pendse and P. H. Kelkar—for Appellant.

G. N. Thakor—for Respondent.

Judgment.—The plaintiff sued to recover Rs. 1,800 as damages from the defendant for refusing to carry out the contract to prepare and supply to the plaintiff 2,000 copies of the plaintiff picture. The breach is admitted, but the defendant contends that the contract came within the provisions of S. 23, Contract Act, and as the agreement is fraudulent, or involved or implied injury to some person, its object or consideration is unlawful, and the contract is therefore void. The defendant must depend for this contention on the argument that as there was in England a firm which had a copyright in this picture, it was a fraud on them to print the picture in India.

It was first contended that the Fine Arts Copyright Act of 1862 (25 & 26 Vic. c. 68) had been extended to British India, but it is quite clear from the decision in *Graves & Co., Ltd. v. Gorrie* (1), to which we have been referred, that the Act does

(1) [1903] A. C. 496=72 L. J. P. C. 95=89 L. T. 111=52 W. R. 113=19 T. L. R. 652.

not extend to any part of the British Dominions outside the United Kingdom.

Then it is alleged that at Common law an author, a publisher or a painter has a copyright in his productions. That question was decided in *Jefferys v. Boosey* (2); and in *Macmillan v. Khan Bahadur Shamsul Ulama M. Zaka* (3) Farran, J., said:

"I agree with the learned Judge that it must be assumed by Courts of law dealing with questions of copyright that no such right existed at Common law before the Statute of Anne (8 Anne c. 19)."

The judgments in *Graves & Co., Ltd. v. Gorrie* (1) and *Jefferys v. Boosey* (2) are most clear on that subject. They were based on this reasoning, that as soon as an author, a publisher, or a painter gave to the world what he had written or created, it became public property, and there was no right at Common law which protected him from his works being copied by anyone who chose to do so. It appears therefore that this contract does not come within S. 23, Contract Act. The plaintiff is entitled to sue for damages for breach. The appeal, therefore must be dismissed with costs.

G.P./R.K. *Appeal dismissed.*

(2) [1854] 4 H. L. C. 815=3 C. L. R. 625=24 L. J. Ex. 81=1 Jur. (n. s.) 615=10 E. R. 681=94 R. R. 389,

(3) [1895] 19 Bom. 557.

A. I. R. 1920 Bombay 85 (1)

SHAH AND HAYWARD, JJ.

Emperor

v.

Vishvanath Vishnu Joshi—Accused.

Criminal Ref. No. 8 of 1919, Decided on 20th June 1919, made by Dist. Magistrate, Satara.

Criminal P. C. (5 of 1898), Ss. 190 and 4(0)—Second Class Magistrate authorized under S. 190 can try complaint under Cattle Trespass Act, S. 20.

A Magistrate of the Second Class, who is authorized under S. 190, to take cognizance of offences upon receiving complaints, has power to take cognizance of complaints under S. 20, Cattle Trespass Act. [P 85 C 2]

Judgment.—We think that the Second Class Magistrate had jurisdiction to deal with the complaint. The only ground upon which the District Magistrate has suggested that he had no jurisdiction is that he was not specially authorized by the District Magistrate to deal with complaints under S. 20, Cattle Trespass Act. There is no suggestion however that this Second Class Magistrate was authorized

under S. 190, Criminal P. C., to take cognizance of offences upon receiving complaints, and it must be taken for the purposes of this reference that he was so authorized. No further special authority to take cognizance of complaints under S. 20, Cattle Trespass Act, is needed in view of the definition of the word "offence" in S. 4, Cl. (o), which includes any act in respect of which a complaint may be made under S. 20, Cattle Trespass Act. It is clear from Sch. 2, Criminal P. C., that offences under special Acts, punishable with imprisonment for less than one year or with fine only are triable by any Magistrate. We think therefore that the Second Class Magistrate had jurisdiction to deal with the complaint. This conclusion derives support from the decision in *Budhan Mahto v. Issur Singh* (1).

We direct the record and proceedings to be returned.

G.P./R.K. *Order accordingly.*

(1) [1907] 34 Cal. 926=6 Cr. L. J. 363.

A. I. R. 1920 Bombay 85 (2)

MACLEOD, C. J. AND HEATON, J.

Jeshankar Revashankar—Defendant—Appellant.

v.

Bai Divali—Plaintiff—Respondent.

Second Appeal No. 701 of 1918, Decided on 28th November 1919, from decision of Asst. Judge, Ahmedabad, in Appeal No. 275 of 1916.

(a) Evidence Act (1 of 1872), Ss. 107 and 108—Man proved to be not heard of for 7 years will be presumed to be dead on date of suit and not earlier.

A man is presumed to be alive until he is dead. A person asserting that a particular man is dead has to prove it. If he can show that the man has not been heard of for seven years, the Court will presume his death. But the earliest date at which the death can be presumed can only be the date when the suit is filed. It cannot have a further retrospective effect.

[P 86 C 1]

(b) Civil P. C. (5 of 1908), O. 41, R. 23—Suit decided on misunderstanding of Ss. 107 and 108, Evidence Act can be regarded as wrongly decided and can be remanded.

Per Heaton, J.—Where a case is wrongly decided owing to a misunderstanding of Ss. 107 and 108, Evidence Act, the case can properly be regarded as a wrong disposal on a preliminary point and remanded to the original Court to be tried afresh. [P 86 C 2]

G. N. Thakor—for Appellant.

H. V. Divatia—for Respondent.

Macleod, C. J.—This litigation has arisen from the disappearance of one

Lallu, who had mortgaged his property to Motilal Nathu. In 1913 Jugal, the first cousin of Lallu, purported to sell the equity of redemption to Jeshankar Rewashankar, defendant 2 in this suit. In 1914 defendant 2 filed a suit against defendant 1 for redemption, and in 1915 this suit was filed by Diwali, the wife of Jamnadas, a more remote relation of Lallu than Jugal. It was admitted that she could only succeed if she could prove that the sale of the equity of redemption to defendant 2 was invalid. In the trial Court the plaintiff's suit was dismissed. In the lower appellate Court the plaintiff got a decree for redemption and defendant 2 was restrained from in any way interfering with the plaintiff redeeming and recovering possession of the plaint property as above directed.

One point to which the attention of the Court was not directed was whether the sale by Jugal in 1913 was a valid one, or whether it was invalid, not because he had renounced the world and, therefore could not succeed to Lallu's estate, but because there was no heir at all at that time of Lallu as no one could say that Lallu was dead. A man is presumed to be alive until he is dead. A person asserting that a particular man is dead has to prove it. If he could show that the man has not been heard of for seven years, then the Court will presume the death: see *Rango Balaji v. Mudiyeppa* (1). But the earliest date to which the death can be presumed can only be the date when the suit was filed. It cannot have a further retrospective effect. Therefore one must take it that Lallu was alive in 1913 unless it can be positively established that he was dead. That apparently no one could do. There can be no heir to a man who is still alive and Jugal had nothing to sell. The result would be that defendant 2 gets nothing by his sale deed. But if he is in possession, then the plaintiff who wants to redeem defendant 1 cannot oust defendant 2 in possession unless she can show that she is the nearest heir to Lallu. A question would then arise whether Jugal is the nearer heir or whether he has lost his inheritance by his having become a Yati. Therefore the best course for us to pursue is to set aside the whole of the proceedings and to remand the case to

the trial Court for disposal after making Jugal a party. There will be three contesting parties to the right to redeem, Jugal, the plaintiff and defendant 2, and if the defendant 2 is in possession, then the plaintiff, before she can succeed, will have to show that Jugal has been ousted from inheritance. The plaintiff must have leave to amend the plaint and the defendants must have leave to submit further written statements. Costs costs in the suit.

Heaton, J.—I think that is a proper order to make. The case has essentially really, although it does not so appear, been wrongly decided on a preliminary point, and this preliminary point is a misunderstanding of Ss. 107 and 108, Evidence Act. Owing to a misunderstanding of these sections the lower Courts have gone on the wrong lines in disposing of this matter. I think therefore we can properly regard it as a wrong disposal on a preliminary point and send back the case to the original Court to be tried over again. The misunderstanding is this: the Court seems to have thought that if you prove that a man has not been heard of for seven years by those who would naturally have heard of him if he had been alive, then you have shown that he is to be regarded as dead after those seven years. But S. 107, Evidence Act, tells us that if a man is shown to have been alive within thirty years the burden of proving that he is dead is on the person who affirms it. Now in this case it is not denied that Lallu was alive within 30 years. So that as the suit started, it started on the presumption that he was alive, and it was for any one who asserted that he was dead to prove that he was dead. The parties seeking to prove that he was dead failed to prove it, but they did prove that he had not been heard of for more than seven years, so that the burden of proof was shifted, as is provided by S. 108, and as thereafter the other side were unable to show that Lallu was alive, it was taken that he was dead. But that can only mean that he was taken to be dead either at the moment when the pronouncement was made by the Judge or at the time the suit was brought. For the issue was and is:

Whether Lallu is alive or dead? It was not whether he was alive or dead in 1913, that is, at a date prior to the suit.

(1) [1899] 23 Bom. 296.

If it had been, it would have had to be proved that he was dead then, and this has not been proved. It might be a matter for very nice argument to determine which of those times should be taken: the date of suit, or the date of judgment. But I see in their Commentary on the Law of Evidence, Ameer Ali and Woodroffe state in a footnote to S. 108 as follows:

"The only presumption indicated by the section is that a party is dead at the time of suit, but there is no presumption in any case as to the time of his death."

I am content to follow that reading of the law, and so all that was proved here was that when the suit was brought Lallu was dead. The Courts however have thought that what was established was not merely that Lallu had died at some unknown period previously, but at any rate that he was dead in 1913, and therefore that Jugal at that time had succeeded to the property, or would have succeeded if he had not become a sanyasi, and that if he succeeded to the property, he would have power to transfer the equity of redemption to defendant 2. The whole of that part of the decision of the lower Court is fallacious. The suit has become now so complicated by reason of the various parties interested, and the fact that there has been another redemption suit by defendant 2, that really the only possible way of getting a proper and clear disposal of the matters in dispute is by making the order which my Lord the Chief Justice has proposed and in which I concur.

G.P./R.K.

Suit remanded.

A. I. R. 1920 Bombay 87

MACLEOD, C. J. AND HEATON, J.

Ramchandra Raghunath Shirgaonkar
—Plaintiff—Appellant.

v.

Vishnu Balaji Hindalekar—Defendant
Respondent.

Second Appeal No. 160 of 1918, Decided on 13th January 1920, from decision of Asst. Judge, Ratnagiri, in Appeal No. 205 of 1916.

(a) Landlord and Tenant—Improvements—After expiry of lease of site vacant possession must be given—If building not removed it becomes landlord's property.

The ordinary rule is that a tenant must give up vacant possession of the land demised at the end of the term. If he builds on the land of the tenancy he builds at his own risk, and at the end of the term he can take away his building. If

he leaves it there, it becomes the landlord's property. — [P 87 C 2]

(b) Landlord and Tenant—Compensation—Tenant in possession for number of years constructing substantial building—Compensation held payable before ejection.

Where a tenant who had been in possession of land for a very large number of years built a costly and substantial house on the land of the tenancy with the knowledge of the landlord:

Held: that the landlord could not eject the tenant without paying him compensation in respect of the house. [P 88 C 1]

S. R. Bakhale for *N. M. Samarth*—for Appellant.

A. G. Desai—for Respondent.

Macleod, C. J.—The plaintiff sued for possession of the plaint property and that it might be restored to him by removing the defendant's building. The trial Court ordered the plaintiff to get possession on paying Rs. 2,000 to the defendant. The appellate Judge reversed the decree of the lower Court and directed that the defendant should retain possession of the land covered by the building. The tenant has been in possession of the land for a considerable number of years, but it is admitted that he is not a permanent tenant under the documents which exist, nor can he claim to be a permanent tenant under S. 83 of the Land Revenue Code. But the learned Appellate Judge considers that because he has been allowed without objection to build on a portion of the land, therefore what were agricultural leases for a year had become building leases. I am afraid I cannot follow that argument. The ordinary rule is that a tenant must give up vacant possession at the end of his term. If he builds he builds at his own risk, and at the end of the term he can take away his building. If he leaves it there, it becomes the landlord's property.

Then it seems that the learned appellate Judge has come to the conclusion that there was a sort of an estoppel which created a permanent tenancy as regards the portion of the land built upon. But that would be to ignore the real nature of an estoppel which prevents a party telling the truth, but it could not possibly create a permanent tenancy. All that we can say is that there is certainly an equity in this particular case on its own facts in favour of the plaintiff being bound to compensate the defendant if he gives notice. The defendant has been in possession. He also paid rent for this land.

for a very large number of years and has built to the knowledge of the plaintiff, as is admitted, one of the finest houses in Malvan, and we must say this: that very probably the defendant thought he would not be disturbed. But now the land has gone up in value, and the plaintiff evidently is not content with receiving the very small rent received by him on the terms on which he let it to the defendant, with the result that he has given notice. He gets a fine house under the decree of the trial Court, which probably is worth much more than Rs. 2,000 having regard to the increased prices. If we order the defendant to remove the house, it would probably be worth nothing as the materials would not fetch much when broken up. I think we ought to rely upon the discretion of the trial Court and hold that this was a case in which in equity the plaintiff ought to compensate the defendant for retaining his building. We allow the appeal and restore the decree of the trial Court. The plaintiff will get his costs throughout from defendant 1. The cross-objections are dismissed with costs.

Heaton, J.—I agree to the decision proposed. The mistake made by the lower appellate Court, I think, was that it inferred something precise when it was logically impossible to infer anything but what was vague. No doubt it is quite logical to say that there must have been some sort of understanding between the landlord and the tenant, for the latter never would have put up such a costly building as he did, if he held only the position of an annual tenant. But when we come to the question what was it that was understood between the landlord and tenant, we find everything is vague. There is nothing in writing about it. No one deposes to it. It is all left to be inferred from general circumstances. It seems to me that you cannot, in a case like this, from general circumstances infer that which requires to be proved by definite evidence, such as for instance that there was a building lease, or that there was a specific understanding the terms of which can be stated. I think therefore that all that we can do is to say that although there is no specific agreement proved of the nature inferred by the lower appellate Court, yet the circumstances do show that it would be very unjust to evict the defendant without awarding him

compensation. Therefore I think the order proposed by my Lord the Chief Justice is the correct order to make in this case.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 88

SHAH AND CRUMP, JJ.

Motichand Magandas and others—
Plaintiffs—Appellants.

—v.

Keshav Appaji Kulkarni and others—
Defendants—Respondents.

Second Appeal No. 58 of 1918, Decided on 19th December 1919, from decision of Dist. Judge, Khandesh, in Appeal No. 494 of 1916.

Contract Act (9 of 1872), S. 30—Real contract with strangers to avoid risk of wagering contracts does not make latter valid.

Where in a contract between a pakka adatia and one of his constituents the common intention of the parties is to deal in differences only and to wager, such contract is not rendered valid by the mere circumstance that, in order to avoid the risk of the contract, the pakka adatia has entered into contracts with third parties which are not in the nature of a wager.

[P 89 C 2]

G. S. Rao—for Appellants.

P. B. Shingne—for Respondents.

Shah, J.—This second appeal arises out of a suit, which is in form a suit to recover money due on a khata, but in substance a suit to recover the amount due in respect of certain contracts entered into between the plaintiffs and the defendants.

The trial Court found that the contracts between the plaintiffs and the defendants were wagering contracts, and that certain contracts, which the plaintiffs had entered into with third parties to cover some of the contracts between themselves and the defendants, were not shown to be wagering contracts. It accordingly decreed the plaintiffs' claim in respect of such contracts. The defendants appealed to the District Court, and that Court held on the evidence that the common intention of the parties (the plaintiffs and the defendants) was to deal in differences only and to wager, and that it was a matter of indifference whether with a view to avoid the risk of certain contracts with the defendants the plaintiffs entered into contracts with third parties. The lower appellate Court disallowed the plaintiffs' claim as regards all the contracts with the defendants.

The plaintiffs have appealed to this Court, and it is urged on their behalf that the plaintiffs are pakka adatias, that the contracts were entered into on the pakki adat system, and that in such a case where the plaintiffs enter into contracts with third parties to cover contracts entered into by them with the defendants, the intention of those third parties must be shown to be the same as the intention of the defendants to deal in differences only and to wager, and that it is not sufficient to show that the common intention of the plaintiffs and the defendants was to wager. In support of this contention Diwan Bahadur Rao has particularly relied upon the judgment in *Bhagwandas Parasram v. Bujrorji Rattonji* (1). Several other cases also were referred to in the argument. On behalf of the respondents it is urged that it is found as a fact that the common intention of the parties was to wager, that as a matter of law it is not essential to prove that the intention of the parties with whom the plaintiffs entered into contracts also was to wager, and that the observation of the lower appellate Court as to the contracts between the plaintiffs and the third parties means nothing more than this: that if there is satisfactory evidence to show the common intention of the parties, the intention of the third parties, who entered into contracts with the plaintiffs with which the defendants have nothing to do directly, would not matter under the circumstances. In short Mr. Shingne contends that it is a finding of fact which ought to be accepted in second appeal.

Both parties have argued the appeal before us on the footing that the plaintiffs are pakka adatias and that the contracts between the parties were entered into according to the pakki adat system. The incidents of the pakki adat system have been mentioned in *Bhagwandas v. Kanji* (2) and the arguments before us have proceeded on the assumption that the contracts in question are subject to the same incidents. The lower appellate Court has dealt with the case on the same basis. I desire to make this clear, as the plaintiffs carry on their business at Amalner, and not in Bombay as was the case in *Bhagwandas v. Kanji* (2),

which was decided on the evidence as to the custom of the Bombay market, and as the trial Court has described the plaintiffs as jokhami adatias in the judgment and has not apparently referred to the incidents of the pakki adat system. It may be that under certain circumstances a jokhami adatia may be nothing more than a del credere agent; but it is sufficient to point out that it is common ground before us that the plaintiffs are pakka adatias and have done business with the defendants as such.

In appreciating the rival contentions of the parties it is important to remember that both the lower Courts have found that the common intention of the plaintiffs and the defendants was to deal in differences only. The lower appellate Court observes with reference to the transactions between the parties in grain and cotton that they were all forward transactions; no delivery was ever asked or given on either side during the three years; and that the settlement between the parties was always entered in the plaintiffs' accounts by differences. It has considered the evidence and held that they were not commercial transactions but wagers on the rise and fall of the market. This finding is based upon evidence and unless there is any error of law we are bound by it in second appeal. All the reported cases that have been referred to in the arguments were cases, in which the Courts concerned dealt with the evidence in the case and had to find the common intention of the parties on the evidence. The limitation which applies to a second appeal did not apply to those cases.

The only error of law suggested is that it is necessary for the defendants to establish that the third parties, with whom the plaintiffs entered into contracts to cover their contracts with the defendants had the same common intention. If the plaintiffs are pakka adatias, they enter into contracts with the defendants, and the defendants have nothing to do with the contracts of the plaintiffs with third parties. The position of a pakka adatia differs in this respect from that of an ordinary commission agent as pointed out in *Bhagwandas v. Kanji* (2). I do not see how it could be said as a matter of law that the common intention of the third parties to wager must be proved. All that could be said is that the com-

(1) A. I. R. 1917 P. O. 101=42 Bom. 373=45 I. A. 29=44 I. C. 284 (P.O.).

(2) [1906] 80 Bom. 205=7 Bom. L. R. 611.

mon intention of the two contracting parties (i. e., the plaintiffs and defendants) must be proved, and that in determining that fact on evidence the Court ought to take into account as a piece of evidence the circumstance that the pakka adatia has entered into contracts with third parties which are not wagering contracts to cover their contracts with the defendants, and that if the pakka adatia's contracts with the third parties represent genuine business transactions and not wagers, it may be said he had similar intention in entering into contracts with the defendants. But it would not be conclusive on the question of the common intention of the parties. The judgment of their Lordships of the Privy Council in *Bhagwandas Parasram v. Burjorji Ruttonji* (1) shows that on an appreciation of the evidence in that case their Lordships were not satisfied as to the common intention of the parties; and in dealing with the evidence the circumstance that the third parties were entitled to call for delivery was taken into account. But the question that is considered is whether the parties had the common intention to wager. I do not think that this judgment shows that as a matter of law it is essential to prove not only that the pakka adatia and his constituent had the common intention of wagering but that even the third parties with whom the pakka adatia entered into contracts had the same intention, in order to establish that the contracts between the pakka adatia and his constituent are wagers. In the present case it seems to me that on the evidence the common intention of both the parties is found and that there is no error of law which can vitiate it. The remarks of the lower appellate Court, relied upon as disclosing an error of law when read with reference to the context, mean in effect that the common intention of the parties is clearly disclosed by their uniform course of conduct and that the fact of the plaintiffs having entered into contracts with third parties does not matter under the circumstances.

I would therefore confirm the decree of the lower appellate Court and dismiss the appeal with costs.

Crump, J.—I concur.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 90

SHAH AND HAYWARD, JJ.

Ramchandra Vithal Bhat—Plaintiff—Appellant.

v.

Gajanan Narayan Deshmukh and others—Defendants—Respondents.

Second Appeal No. 175 of 1917, Decided on 19th September 1919, from decision of Dist. Judge, Thana, in Appeal No. 150 of 1915.

(a) Civil P. C. (5 of 1908), S. 47 and O. 21, Rr. 69 and 96 — Benamidar auction-purchaser can sue for possession and real owner mortgagee decree-holder is not necessary party—Auction-purchaser though benamidar for decree-holder is stranger and S. 47 does not apply — Absence of permission does not vitiate purchase by decree-holder—it is voidable by judgment-debtor only.

Where in execution of a mortgage decree the property is purchased by a benamidar for the mortgagee, the former is entitled to sue in his own name to recover the property vested in him as a benamidar, and the original mortgagee for whom he is alleged to have purchased the property at the Court sale is not a necessary party to the suit. [P 91 C 2]

Such a suit is not barred by the provisions of S. 47, inasmuch as the plaintiff-purchaser is not the decree-holder himself but a third person. For purposes of procedure the auction-purchaser, even though a benamidar for the decree-holder, is a third party. [P 93 C 2]

Where in such a case it appears that the mortgagee did not obtain any leave to bid for or purchase the property, the omission would not render the purchase by the benamidar void. The purchase is merely liable to be set aside at the instance of the judgment-debtor in proceedings properly framed for that purpose and until so set aside, holds good. [P 92 C 1]

(b) Civil P. C. (5 of 1908), O. 2, R. 2 — Separate suits for possession against different sets of defendants, of separate properties included in one auction-sale are not barred.

An auction-purchaser brought a suit to recover possession of certain property included in his purchase and obtained a decree. Subsequently he brought another suit against a different set of defendants to recover possession of certain other property which was also included in his purchase.

Held: that the suit was not barred by the provisions of O. 2, R. 2. [P 93 C 1]

Jayakar and P. V. Kane — for Appellant.

G. S. Rao and W. B. Pradhan — for Respondents.

Shah, J.—It will be convenient to set forth the facts which have given rise to this second appeal.

One Narayan and his other brothers mortgaged a two-anna share in the Khoti Takshim to one Vinayak Tilak with all the Khasgi lands and other rights appertaining to the Takshim. The mortgagee

filed Suit No. 194 of 1902 on his mortgage and obtained a decree. In pursuance of that decree the property mortgaged was sold by the Court and the present plaintiff purchased it at the Court sale on 16th June 1908 for Rs 1,200. The sale was confirmed in July 1908. The auction-purchaser applied to have possession of the property and he recovered possession in December 1908 of the Takshim. It was stated however at the time by him that certain properties to which the sale certificate related were in the actual possession of the defendants and that he had not received possession of those properties. Those properties were not specified; but generally speaking, the main property described in the sale certificate, viz., the Khoti Takshim, was taken possession of under S. 319, Civil P. C., which was then in force. The present plaintiff filed Suit No. 118 of 1910 against some of the defendants to the mortgage suit for possession of certain survey numbers which were in the possession of those defendants. To that suit the present defendants 2 and 3 were joined as parties, but they had nothing to do with the lands then in suit. In that suit it was found that the plaintiff was not a benamidar for the original mortgagee and decree-holder, and that the lands then in suit were covered by the sale certificate. Accordingly a decree was passed in his favour for possession of the lands, and that was upheld by both the appellate Courts in appeals preferred by the defendants in that case who were in possession of the lands then in suit.

The plaintiff filed the present suit in 1914 against defendants 2 and 3, alleging that defendant 1 who was the tenant of defendants 2 and 3 was really in occupation of the land in suit at the date when he recovered possession in 1908 under the sale certificate and that subsequently he had transferred possession wrongfully to defendants 2 and 3. Defendant 1 did not claim any interest in the property, and defendants 2 and 3 contended that the land in suit was not included in the sale certificate, that it was a Khoti Kulargi land, that the plaintiff was a benamidar for the original decree-holder and that the suit was barred under O. 2, R. 2, by the previous Suit No. 118 of 1910. The trial Court came to the conclusion that the plaintiff was not a benamidar

and that he was entitled to recover possession of the lands in suit, as the terms of the sale certificate were sufficient to convey the lands to the plaintiff. The objection based on R. 2, O. 2, Civil P. C., was overruled, with the result that a decree was passed in favour of the plaintiff. Defendants 2 and 3 appealed to the District Court. This Court came to the conclusion that the plaintiff was a benamidar for the original decree-holder, that the latter was a necessary party to the suit, and that the present suit was not maintainable. The learned District Judge accordingly dismissed the plaintiff's suit with costs throughout. The plaintiff has appealed to this Court.

The appeal has been argued before us on the footing that the plaintiff is a benamidar for the original mortgagee and the decree-holder, as found by the lower appellate Court. It is also now common ground between the parties that the land in suit, though not expressly mentioned in the sale certificate, is included therein, and that the purchaser has a title under the sale certificate to the land in suit as he has to the two-anna Takshim.

The first question that arises in this appeal is whether the lower appellate Court is right in holding that the original mortgagee was a necessary party to the suit and that in his absence the plaintiff could not maintain the suit. It is clear, in my opinion, that the original mortgagee, for whom the plaintiff is supposed to have purchased the property at the Court sale, is not a necessary party and that the plaintiff, though a benamidar, can sue in his own name to recover the property vested in him as a benamidar.

The judgment in *Gur Narayan v. Sheo Lal Singh* (1) is a clear authority in favour of this view. Their Lordships observe at p. 9 of the report that

"so long therefore as a benami transaction does not contravene the provisions of the law, the Courts are bound to give it effect. As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the benamidar in respect

(1) A.I.R. 1918 P.C. 140=46 Cal. 566=46 I.A. 1=49 I.O. 1 (P.C.).

of the property, although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him."

This was a case of a private benami purchaser. But, in my opinion, it makes no difference that in the present case the plaintiff is a purchaser at a Court sale. In the case of *Ravji Appaji v. Mahadev Bapuji* (2), Ranade, J., after reviewing the various reported cases, summed up as follows :

"This review of the authorities shows clearly that appellant 1 as benami purchaser had full right to bring the suit. If the true owner holds back, a decree against the benamidar owner would bind him as *res judicata*. The present suit was therefore properly instituted. The addition of appellant 2's name made no difference in the character of the suit."

This was said with reference to a case in which the plaintiff was a purchaser at a Court sale.

It is urged however on behalf of the respondents that this rule holds good so long as the benami transaction does not contravene the provisions of the law and that in the present case the provisions of S. 294 of the Code of 1882 have been contravened, in so far as the decree-holder did not obtain any leave to bid for or purchase the property. It seems to me that the omission on the part of the mortgagee to obtain such a leave does not render the purchase by the benamidar invalid or unlawful. It is clear that so far as the apparent title of the benamidar is concerned, the sale, when it has been confirmed, has the effect of vesting the property in the purchaser and that under S. 66 of the present Code of Civil Procedure and the corresponding provisions of the Code of 1882 even the real owner cannot maintain a suit against the Court purchaser. Further, S. 294 of the Code of 1882 and the corresponding provisions in the present Code show that the omission on the part of the decree-holder to obtain the necessary leave has not the effect of rendering the benami purchase void; but such a purchase is liable to be set aside. It is an admitted fact in this case that none of the defendants in the mortgage suit

applied under S. 294, para. 3, to have the sale set aside. The application for setting aside a sale under that paragraph could have been made within the period prescribed by the law of limitation. No such application was made, and having regard to the fact that the original mortgagors were all brothers and that some of the defendants, who were parties to the suit of 1910, had specifically raised the point that the plaintiff was a benamidar for the original decree-holder, it cannot be said that the defendants were really ignorant of any fact which could have prevented them from making a proper application for setting aside the sale. There is no allegation in the present case that the defendants were ignorant of the real nature of the purchase by the plaintiff during all the time preceding the present suit. The sale certificate therefore must be taken as a valid certificate giving the plaintiff a title to the land in suit which he is entitled to enforce.

It is further urged that though the present defendants 2 and 3 may not be in a position to have this sale set aside by a proper application under para. 3, S. 294, or under the corresponding provisions in the present Code on account of the bar of limitation, it is open to them to plead by way of defence that the title of the plaintiff is vitiated by fraud. In support of this contention reliance is placed upon *Rangnath Sakham v. Govind Narasim* (3) and *Minalal Shadiram v. Kharasetti Jivaji* (4). It is not necessary in this case to express any opinion as to whether such a plea could be raised by way of defence, though any suit based on that ground would be time barred. Assuming in favour of the defendants that such a defence is open to them, it seems to me that on the merits that defence must fail. In the first place, no such plea of fraud was raised in the written statement; and the only fraud suggested in the argument before us is that the property which was roughly valued at Rs. 1,500 fetched only Rs. 1,200 at the Court sale. In my opinion this is no fraud whatever. In the first place there is nothing to show that the property was really worth Rs. 1,500: it only shows that in execution proceedings the Court had estimated the value at that

(2) [1898] 22 Bom. 672.

(3) [1904] 28 Bom. 639.

(4) [1906] 30 Bom. 395.

figure, and the difference between the estimated value and the price actually realized is not so great as to indicate any kind of fraud on the part of the decree-holder or any other person. In connexion with this point the learned pleader for the respondents relied upon the case of *Thathu Naick v. Kondu Reddi* (5). The facts of that case were quite different, and I do not see how that case could be treated as an authority in favour of the view that in the present case the fact of the property having fetched Rs. 300 less than its estimated value amounts to fraud.

It is urged in support of the decree of the lower appellate Court on behalf of the respondents that the present suit is barred under R. 2, O. 2. The contention is that the plaintiff should have included in the suit of 1910 his claim for the possession of all the properties to which he acquired a title under the sale certificate and that if he failed to do so, his present suit would be barred. It is urged that the plaintiff having omitted to sue in respect of the property now in suit in 1910, he cannot now sue in respect thereof. The question is whether the cause of action in the present suit is the same as that in the previous suit. Several cases have been cited in the argument in connexion with this point; but I do not consider it necessary to refer to these cases. The point, it seems to me, must be decided with reference to the facts of this case. It is clear that the cause of action in the present suit cannot be treated as the same as that in the previous suit. The plaintiff no doubt acquired a title to several properties under a general description of the Khoti Khasgi lands under one and the same sale certificate. But his cause of action in respect of the lands in the possession of different persons cannot be treated as the same. It was open to him to have sued the several defendants in possession of the different lands including the present defendants in the suit of 1910; but I do not think that the plaintiff was bound to do so. The property in this suit is different. The parties in possession sued now are different, and the cause of action alleged is also different. For the purposes of this point however I assume that the cause of action is simply that the defendants have withheld possession from him although he is

entitled thereto under the sale certificate, and to leave out of consideration the special allegations which the plaintiff has made. With regard to these special allegations as to the land being in the possession of defendant 1 and the possession having been subsequently transferred by defendant 1 to defendants 2 and 3, the trial Court found in favour of the plaintiff and the appellate Court does not seem to me to have recorded any specific finding on that point. In the view I take of the case, I consider this allegation to be immaterial and it is not necessary to have any finding on that question. Assuming that there was no intervention of defendant 1 and the position of defendants 2 and 3 was throughout as I have stated it, I think that the cause of action would not be the same as that in the suit of 1910 in which different properties were involved and different defendants were in possession of the properties in that suit. The evidence in the present case may be similar, but it cannot be said to be identical. Besides the plea raised by the defendants that the land in suit is kulargi land shows that the evidence in this suit must be different. Taking the meaning of the expression "cause of action" most favourable to the defendants' contention, I am satisfied that the cause of action in the present case is not the same as that in the suit of 1910 and that R. 2, O. 2 presents no bar to the maintainability of the present suit.

It remains only to notice the point which has been made by the lower appellate Court but which has not been pressed before us. The learned Judge has held, relying on *Sadashiv v. Narayan* (6), that the proper remedy of the plaintiff is not a suit but an application in execution under S. 47, Civil P. C. That was however a case in which the decree-holder himself was the purchaser. The view taken in that case has not been applied to a case in which the decree-holder himself is not the purchaser but where a third person has purchased benami for him. For the purposes of procedure the auction-purchaser, even though a benami, for the decree-holder, is a third party. The ruling in *Sadashiv v. Narayan* (6) really can apply to a case where the decree-holder himself is the purchaser at the Court sale. The present suit is a suit by an auction-purchaser, who is not the

(5) [1909] 32 Mad. 242=1 I. O. 221.

(6) [1911] 35 Bom. 452=11 I. O. 987.

decree-holder for the purposes of procedure and who is therefore entitled to sue to recover possession of the property which he has purchased.

In my opinion therefore this appeal should be allowed, the decree of the lower appellate Court reversed and that of the trial Court restored with costs here and in the lower appellate Court on defendants 2 and 3.

Hayward, J.—I concur. I have no doubt that the benamidar was entitled to sue. The certificate of sale was good title until set aside in regular proceedings. The general proposition of law has clearly been wrongly stated by the lower appellate Court. It would be sufficient to refer to the Privy Council case of *Gur Narayan v. Sheo Lal Singh* (1). But it has been argued that the benamidar had no permission to bid at the sale and that it was therefore a nullity.

But no steps were taken to avoid the sale as they might have been in execution on that account, nor was it alleged in the written statement that there was any fraud. It was not even alleged in the first appeal Court. It has, as a final resource, been alleged here, but it has, in my opinion, not been established. It would appear to me therefore no good reason for treating the sale as a nullity, whether or no it was open to the defence to raise the plea of fraud in view of the provisions of Art. 166 of the Schedule of the Limitation Act.

It has been somewhat difficult to follow the line of reasoning in the remainder of the judgment of the first appeal Court. The learned Judge devoted a material part of his judgment to the proposition, not raised as an issue, that the real remedy for recovering possession was by execution and not by way of suit, and he held that there was no real possession recovered in execution and apparently (the point was not clearly stated) that there was no remedy left by suit. But he did not explain precisely why even in default of recovery of possession in execution there should not have been a regular suit to recover possession upon the title-deed, that is to say, the certificate of sale of the Court.

The learned Judge held, on the other hand, on the issue raised that there was no bar to the suit under O. 2, R. 2, Sch. 1, Civil P. C. But he has not given, so far as it would appear from the judgment,

any reasons for that conclusion. It would appear to me however to have been correct. For he has found as a fact that the previous suit was to recover possession of different properties from different defendants. If that were so, it was, in my opinion, clear that recourse could not be had to O. 2, R. 2, Sch. 1, Civil P. C. My detailed reasons for holding this need not be further stated as they have already been given in the case of *Sonu Khushal Khadake v. Bahinibai Krishna* (7).

It seems to me therefore that we ought to restore the decree of the trial Court and reverse that of the first appeal Court.

G.P./R.K.

Appeal allowed.

(7) [1916] 40 Bom. 351=33 I. C. 950.

A. I. R. 1920 Bombay 94

MACLEOD, C. J. AND HEATON, J.

Gangadhar Mahadeo Mirashi and others—Plaintiffs—Appellants.

v.

Krishnaji Vishram Nadkarni and others—Defendants—Respondents.

Second Appeal No. 104 of 1918, Decided on 11th December 1919, from decision of Asst. Judge, Ratnagiri, in Appeal No. 101 of 1916.

Civil P. C. (5 of 1908), O. 7, Rr. 14 and 18—Document, basis of claim if not produced for long time, can be rejected.

Under O. 7, R. 14, it is desirable that a party who sues upon a document should produce it at the time he files his plaint; if such document is produced a considerable time afterwards when the suit comes on for hearing, the Court would be justified, in the exercise of its discretion under R. 18, to disallow production of the document. [P 94 C 1]

K. N. Koyajee—for Appellants.

A. G. Desai—for Respondents.

Judgment.—The plaintiffs sued to recover possession of the plaint property. They relied in the plaint as the basis of their title on a certain will and an award. Neither of these documents was produced when the plaint was filed, as ought to have been done, under O. 7, R. 14. The will was only produced on the 9th February 1916, the day before the judgment was given, and the award was not produced at all. The Judge therefore, exercising his discretion under R. 18, did not allow the plaintiffs to produce the material documents at that stage of the case and dismissed the claim. In appeal the Assistant Judge confirmed the decree of the lower Court. I agree with the reasons which are given by the

learned Subordinate Judge. R. 14, O. 7 was enacted in order that its provisions might be complied with, and the reasons for its enactment are very clear. It is certainly desirable that a party who sues upon a certain document should produce it at the time he files the plaint and not spring it upon the opposite party two or three years after when the suit comes on for hearing. The defendant, of course, has a remedy, if he chooses, to apply for discovery. But apparently the remedy by discovery is not made much use of in the mufassil. Therefore, both the lower Courts, in my opinion, were perfectly right in finding that the plaintiffs had not proved their case. Therefore the appeal must be dismissed with costs.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1920 Bombay 95**

MACLEOD, C. J. AND HEATON, J.

Janardan Shankar and others—Defendants—Appellants.

v.

Krishnaji Balkrishna Bhate—Plaintiff—Respondent.

Letters Patent Appeal No. 38 of 1918, Decided on 20th January 1920, from decision of Shah, J., in Second Appeal No. 967 of 1917.

Civil P. C. (5 of 1908), O. 34, R. 6—Mortgage decree with condition to sell property on default of two instalments—Decree held could not be construed to mean that any but mortgaged property could be sold.

A compromise decree passed in a mortgage suit directed the payment of the mortgage money by instalments and went on to provide: "In default of the payment of any two instalments, the plaintiff should recover the whole of the amount then due including all the future instalments by sale of the mortgaged property through Court."

Held: that the decree did not give any right to the decree-holder to proceed against any property of the judgment-debtor except the mortgaged property. [P 96 C 1]

G. P. Murdeshwar—for Appellants.

P. B. Shingne—for Respondent.

Macleod, C. J.—A decree was passed on 23rd August 1910 in a mortgage suit filed by the plaintiff, whereby it was directed that:

"the defendants should pay to the plaintiff Rs. 2,754-9-2 as claimed, costs of the suit, and interest on the principal sum of Rs. 2,400 from the date of the suit up to this day at the rate of 6 per cent per annum, whatever the sum might come to."

The same was directed to be paid in the following manner:

"Defendants should pay Rs. 800 each year to the plaintiff. Plaintiff should bring the same

to account in the following way In this way the defendants should pay the whole sum in instalments by paying Rs. 800 per year to the plaintiff as above until payment of the sum in full. The property in suit should remain in the possession of the defendants. Until payment of the whole mortgage amount the whole of the sum should be a charge on the mortgaged property. In default of the payment of any two instalments, the plaintiff should recover the whole of the amount then due including all the future instalments by sale of the mortgaged property through Court."

The defendants fell into arrears, and the plaintiff became entitled to execute. In his darkhast he claimed to be entitled to execute not only by sale of the mortgaged property, but also by attaching other property belonging to the defendants. This claim was allowed by the lower Courts, and on appeal before Shah, J., the decisions of the lower Courts were confirmed. I fail to see how this decree differs in any respect from an ordinary mortgage decree, which no doubt directs money to be paid by the mortgagor, but also directs that in default of payment in the prescribed manner, or within the prescribed period, the mortgaged property may be put up for sale. Then O. 34, R. 6, says:

"Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount."

That contemplates that if the mortgaged property has been sold, and there is a deficiency, then the Court will proceed to consider whether the balance should be recovered personally from the mortgagor, and if it thinks it should then it passes a final decree personally against the mortgagor for the amount of the deficiency. Such a decree will be passed in the original suit, so that a fresh suit need not be filed. But it must follow that the question whether the mortgagee can recover the amount personally from the defendant, and not from the mortgaged property, is subject to entirely different considerations than those which guide the Courts in passing a decree for recovery of the amount charged on the property mortgaged. It seems clear to me that there must be a decree personally made against the mortgagor before it can be executed against property other than the mortgaged property. The decree in this case cannot be said to be a personal decree merely

because it directs that the defendants should pay the amount." It directs specifically how the plaintiff shall recover the decretal amount if default is made in payment, and it says nothing about what shall happen supposing the mortgaged property, when sold, is insufficient to pay the mortgage debt. The plaintiff has endeavoured to avoid the difficulties, which may lie in his path if he followed the strict procedure, by proceeding in execution and asking that, if the mortgaged property when sold is insufficient, then some other property should be sold. In my opinion the mortgagee cannot follow the course. Therefore with all due respect to the judgment of Shah, J., I think that the order of the trial Court cannot be supported, and that so far as it relates to property other than the mortgaged property, it must be set aside. The appellant will be entitled to his costs throughout.

Heaton, J.—I agree to the order proposed. After reading the decree which is now the subject of execution, it seems to me that it does not give any right to the decree holder to proceed against any property of the judgment-debtor, except that property on which the judgment-debt is made a charge. It certainly cannot be doubted that the decree does not expressly give the decree-holder any power to proceed against any other property, or against the judgment-debtor personally. If such a result is to be arrived at, it can only be arrived at by implication. But again it seems to me on a very careful reading of the decree that the implication is not in that direction, but against it. It may be that if the mortgaged property when sold fails to discharge the mortgage debt, there will still remain to the mortgagee a remedy for the recovery of so much of the debt as is not paid. It may be that he will be able, in order to recover that unpaid balance, to proceed against other property of the judgment-debtor. But that it seems to me will follow, if it does follow, from the general law relating to mortgagee and mortgagor, and not from the decree which has been made in this case. Indeed I myself should be inclined to say, that if any such result follows, it follows not on account of, but in spite of, the decree that has been made.

G.P./R.K.

*Appeal decreed.***A. I. R. 1920 Bombay 96**

MACLEOD, C. J.

Satagauda Appanna Alagauda Navar
—Plaintiff—Appellant.

v.

Satappa Darigauda Genapanavar and others—Defendants—Respondents.

Second Appeal No. 1068 of 1918, Decided on 11th December 1919, from decision of Asst. Judge, Belgaum, in Appeal No. 319 of 1916.

Civil P. C. (5 of 1908), O. 34, R. 1—Person claiming paramount title should not be allowed to be joined in redemption suit.

A suit for redemption is a suit between the mortgagor and the mortgagee, and only those parties can be joined in the suit who claim an interest in the mortgage security or in the right to redeem. The introduction of an outsider, who claims a title to the property independently of the mortgagor and the mortgagee, would result in introducing new matter absolutely irrelevant to the issues in the mortgage suit and should not be allowed. [P 97 C 1]

Nilkant Atmaram—for Appellant.

A. G. Desai—for Respondents.

Judgment.—The plaintiff purchased from one Santu Chambhar what he thought was the equity of redemption in a certain property mortgaged by Santu Chambhar to defendant 1 in 1893. When the suit was launched, defendants 2 and 3 were in possession claiming that they had purchased the property from a brother of Santu Chambhar and that Santu Chambhar had no interest in the property. Therefore they were made parties by the plaintiff, who thought that it was necessary to make them parties under O. 34, R. 1. The record in the print is somewhat defective as it does not appear what were the issues raised in the trial Court. But I find that the following issues were raised :

(1) Whether defendants 2 and 3 are in possession through defendant 1. (2). Whether the suit could lie in its present form against them in view of the finding on issue No. 1 and (3). What order should be passed.

I do not find any decision of the trial Court on issue 1. All that appears is that defendants 2 and 3 were not considered necessary parties to the suit. Therefore the suit was dismissed as against them. I can only presume that somewhere the Court recorded evidence and decided that defendants 2 and 3 were not in possession through defendant 1. I find now that issue 1 was decided in the negative for want of evidence, and as defendants 2 and 3 claimed independently of the mortgage and against both the mort-

gagor and the mortgagee, they could not be proper parties to this suit which was a redemption suit. This suit was then dismissed as against defendant 1 also, because the plaintiff did not accept the option given to him of prosecuting the suit as against him. This decision was upheld in first appeal. In second appeal the result must be the same. Before the passing of the Civil Procedure Code of 1903 it seems to have been doubted whether under S. 85, T. P. Act, which enacted that all persons having an interest in the property comprised in a mortgage should be joined, was meant to refer to parties who were not interested either in the mortgage security or the right of redemption. This obscurity was set aside by O. 34, R. 1, Civil P. C., of 1908. It is obvious that a suit for redemption is a suit between the mortgagor and the mortgagee, and only those parties can be joined who claim an interest in the mortgage security or in the right to redeem. For if you bring in outsiders who claim a title to the property independently of the rights of the mortgagor and the mortgagee, you are introducing entirely new matter into the suit, new matter which would be absolutely irrelevant to the issues which would be framed in the mortgage suit. The decree then of the lower appellate Court was perfectly correct and the appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 97

MACLEOD, C. J. AND HEATON, J.

Thakarana Tejrani—Plaintiff—Appellant.

v.

Sarupchand Chhaganbai—Defendant—Respondent.

First Appeal No. 155 of 1917, Decided on 10th November 1919, from decision of Joint Judge, Ahmedabad, in Suit No. 5 of 1914.

Hindu Law—Adoption—Last surviving co-parcener dies leaving widows—Widow of predeceased co-parcener cannot adopt.

The widow of a deceased co-parcener of a joint Hindu family cannot, in the absence of specific authority, make an adoption subsequent to the death of a co-parcener who survived her husband, more particularly where that co-parcener has left widows. [P 98 O 1]

N. K. Mehta—for Appellant.

G. N. Thakor, M. B. Dave for *C. N. Pandya*—for Respondent.

1920 B/13 & 14

Srinagac. J.—In this case we have the Talukdari Settlement Officer, on behalf of a person described as a talukdar, suing to redeem a mortgage. The mortgaged property, it is admitted, was part of the jivai estate which up to the year 1847 was vested in one Raisang, who in that year died. He left a nephew, the son of his brother, and a widow, and it was the widow and the nephew who joined in making the mortgage to redeem which this suit has been brought. The defendants opposed the claim on the ground that Narsang, the talukdar, whose estate is under the management of the Talukdari Settlement Officer, has no right to redeem the mortgage. Narsang himself is dead and was succeeded by a son Fulsangji. But the question is whether Narsang was or was not validly adopted by Surajrani, the widow of Raisang. If he was validly adopted, then the plaintiff's suit must succeed. If he was not validly adopted, the plaintiff's suit must fail, because it is brought by one who has no right to redeem the mortgage. The adoption was made by Surajrani, the widow of Raisang, after [the death of Manbhai, the nephew of her husband. Manbhai or his father, it would seem, had held the jivai subsequent to Raisang's death in 1847. Manbhai died in 1882 and in 1884, i. e., nearly 40 years after her husband's death, Surajrani made the adoption. By the law as it is understood in this presidency, an adoption of this kind in a family which constituted a joint Hindu family, although the property was impartible, could not be validly made.

We were however referred to a very recent case decided by the Privy Council last year, *Partapsing Shivsing v. Agar-singhji Raisinghji* (1). In that case however the facts were that the adoption had been made within the period of gestation succeeding the death of the widow's husband. Those facts were the subject of argument in the case. They were expressly mentioned in the judgment, and it appears the only thing that was decided was that in circumstances of that kind an adoption would be valid. But where the circumstances are, as they are here, it seems to me quite plain that we must follow what is well understood as the ordinary law in this presidency

(1) A. I. R. 1918 P. C. 192=43 Bom. 778=46 I. A. 97=50 I. O. 457 (P.O.).

and apply it to the facts. The widow of a deceased co-parcener of a joint Hindu family cannot, in the absence of any specific authority, make an adoption subsequent to the death of a co-parcener who survived her husband; and more particularly when, as here, that later surviving co-parcener left widows. It seems to me therefore quite plain that the decision of the Court below is correct and that this appeal must be dismissed with costs. One set of costs to respondent 1 only.

Macleod, C. J.—I agree.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1920 Bombay 98

SHAH AND CRUMP, JJ.

Bhagoji Ganu Raut and others—Plaintiffs—Appellants.

v.

Balu Kadam — Defendant — Respondent.

Second Appeal No. 694 of 1917, Decided on 19th December 1919, from decision of Asst. Judge, Ratnagiri, in Appeal No. 102 of 1916.

Custom—Custom of watandar barber to officiate on ceremonial occasions is not bad for unreasonableness—Payments to such are dues and not gratuities.

By custom a watandar barber is entitled to officiate on ceremonial occasions, and such custom is not unreasonable nor is it opposed to public policy.

The payments made to a watandar barber for so officiating are not mere gratuities, but are customary payments for services and though they may not be fixed they are well understood and recognized [P 99 C 1, 2]

D. S. Varde—for Appellants.

K. N. Koyajee—for Respondent.

Shah, J.—The plaintiffs in this case claimed to be the watandar barbers of Velaneshwar and five other adjoining villages and as such claimed the exclusive right to officiate as barbers on ceremonial occasions in those villages. They sued the defendant for an injunction and damages in consequence of his having rendered services as a barber on some ceremonial occasion to certain Bhandaris on 11th March 1915.

The defendant denied the exclusive right of the plaintiffs to officiate on all ceremonial occasions and claimed to be a watandar barber himself in the said villages.

The trial Court found all the issues, except one relating to injunction, in

favour of the plaintiffs and passed a decree in their favour for damages.

The defendant appealed to the District Court and the plaintiffs filed cross-objections. The learned Assistant Judge, who heard the appeal, held that the suit was maintainable and that the plaintiffs were watandar barbers. He held however that the expression "Watandar barbers" did not carry with it any rights and that the plaintiffs had no right to require the Bhandaris to get the 'kshaura' done by them and that the defendant was not liable for damages. He purported to follow the test laid down in *Muhammad Yussub v. Sayad Ahmed* (1). The plaintiff's suit was accordingly dismissed. The plaintiffs have appealed to this Court and it is urged on their behalf that on the finding of the lower appellate Court the plaintiffs' claim for damages ought to be allowed, that the observations in *Muhammad Yussub v. Sayad Ahmed* (1), have not been properly understood by the lower appellate Court, that the office of a village barber is useful to the village community, that like a village joshi a village barber may acquire certain customary right to perform services as a barber on ceremonial occasions, and that such a barber would be entitled to the customary, though not necessarily fixed, fees from another barber who has no right to perform similar services in the said villages and who has deprived the watandar barber of his usual fees by officiating to his detriment.

On behalf of the respondent it is urged that such a right is incapable of acquisition by custom, that the reason underlying the decisions relating to a village joshi cannot apply and ought not to be applied to a village barber that, the payments made on ceremonial occasions to the barber are mere gratuities and not fixed fees, and that the test laid down in *Muhammad Yussub's* case (1) has been correctly applied by the lower appellate Court.

Apart from the findings of fact recorded by the lower appellate Court the respondent's contentions would have considerable force. In the present case it is found that the plaintiffs are watandar barbers, and that the defendant is not a watandar barber, though he claimed to be one in respect of the villages in question. The lower appellate Court observes

(1) [1862-65] 1 B. H. C. R. (App.) 18.

that "the conclusion from the whole evidence is that it is customary to recognize the right of a watandar barber to do services for his customers." The finding derives considerable support from the defence raised by the defendant that he himself had such a right in common with the plaintiffs. I do not see any sufficient reason not to accept this finding. On the basis of this finding it is difficult to distinguish the case of a village barber from that of a village joshi. The right of a village joshi to officiate and to receive the customary dues on all ceremonial occasions has been recognized in this Presidency: see *Vithal Krishna Joshi v. Anant Ramchandra* (2) and *Raja v. Krishnabhat* (3). It is true that the right of a village barber has not been similarly affirmed in any reported case. The learned pleaders in the case have not been able to draw our attention to any precedent in favour of such recognition and I am not aware of any. It is quite possible that the watandar barbers with a right to officiate do not exist in the Presidency to the same extent as the hereditary village Joshis, and that may be a possible explanation of the absence of any precedent on the point. However that may be we have to consider the question on its own merits.

In view of the finding that the plaintiffs are entitled to officiate on ceremonial occasions by custom, I do not see any sufficient ground to refuse to recognize their right. It is a customary right, which is not in any sense opposed to public policy, and it is not suggested in the argument that it is opposed to public policy. It is not unreasonable; and a barber is one of the recognized village servants, who are useful to the village community. It may be that his services are not religious in the sense that a village joshi's services are. But the services of a barber may be essential on ceremonial occasions, and may form part of the religious ceremonies taken as a whole. I am therefore, of opinion that there is no sufficient reason not to give effect to the finding of the lower appellate Court.

I am unable to agree with the lower appellate Court that the payments made to the barber for his services on ceremonial occasions are mere gratuities. They

are customary payments for services, though they may not be fixed. As pointed out in *Vithal Krishna Joshi v. Anant Ramchandra* (2) they need not be fixed. They may vary within certain limits, which though not defined are usually well understood and recognized. The trial Court refused to grant any injunction but allowed relief to the plaintiffs on the lines accepted in the decisions relating to the village Joshis. I think that under the circumstances that was the proper decree.

I would therefore reverse the decree of the lower appellate Court and restore that of the trial Court with costs in this Court on the respondent. Each party to bear his own costs in the lower appellate Court.

Crump, J.—I concur.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 99

MACLEOD, C. J. AND HEATON, J.

Saydanmia Rahimanmiya and another
—Plaintiffs—Appellants.

v.

Hasanmiya Manwar Miya and others
—Defendants—Respondents.

Second Appeal No. 332 of 1918, Decided on 20th January 1920, from decision of Dist. Judge, Ahmednagar, in Appeal No. 79 of 1916.

Pensions Act (23 of 1871), Ss. 4 and 6.—When inam should be treated as of lands stated—Certificate under S. 6 is not necessary for suit in reference to such grant—Grant, inam.

Where the decision of the Inam Commissioner was that a village, excluding the ancient hakdars and inamdars, should be continued as inam in the grantees' family so long as their male descendants were alive, the order should be construed as adjudging the lands and not merely the revenues of the village to the grantees, and a certificate under S. 6, Pensions Act, is not necessary in order to enable a civil Court to entertain a suit relating to such grant.

(P 100 C 2)

G. S. Rao—for Appellants.

Coyajee and J. G. Rele—for Respondents.

Macleod, C. J.—The plaintiff brought this suit praying that it might be declared that plaintiffs 1 and 2 had a 1 anna 4 pies share in the jahagir village of Kanoshi, and that it might be declared that they were entitled to receive Rs. 65 or any greater or less amount which might be settled according to tharavband, from the village officers by a separate receipt and for an injunction and for other relief.

(2) [1874] 11 B. H. O. R. 6.

(3) [1878-79] 8 Bom. 232.

Before the Subordinate Judge a preliminary issue was framed: Is a certificate under the Pensions Act necessary? The learned Judge held that it was necessary and as the certificate was not produced, the plaintiff's suit was dismissed on 29th November 1913. In appeal the decree was set aside, and the suit was remanded to the trial Court for a framing and trial on evidence of the issue whether the grant to the parties' ancestors was of the soil or of the land revenue. The finding on that issue was that the grant in suit was of the soil, and not of the land revenue only and that a certificate under the Pensions Act was not necessary. A decree was passed on 29th February 1915 in favour of the plaintiff awarding him the greater part of his claim. In first appeal the learned District Judge held that a certificate was necessary. He said that the plaintiff's claim in this case was limited to a share in the net land revenue of an inam village as ascertained from the tharavband and to a corresponding claim for arrears. The learned Judge seems to have overlooked the fact that the plaintiffs claimed a declaration that they were sharers to the extent of 1 anna 4 pies in the jahagir village and that the plaint was not confined to a mere request for a declaration that they were entitled to receive a share of the revenue from the village officers and nothing more.

The learned Judge has not dealt with the question whether there was originally a grant of the soil of the village, and not merely a grant of the royal share of the revenue. The trial Judge has found that this question must be decided wholly on the decision of the Inam Commissioner, copy of which has been filed and was finally marked Ex. 82. That was a decision by the Inam Commissioner under R. 1 Sch. B, Act 11 of 1852. The finding was that the village of Mouje Kanoshi, Taluka Shevgan, District Nagar, excluding the ancient hakdars and inamdars, should be continued as inam to Pir Durga Shaha Sharifa so long as the male descendants of any one of the three persons, namely, Babamiya valad Mahomed Burban, Matumiya valad Baba Sahib and Mahomed Miya valad Darvesh were alive. We have been referred to the decision in *Vasudev Pandit v. Collector of Puna* (1) and that case is

almost exactly on all fours with this case. The learned Judge said:

"If we felt ourselves free to dispose of the case on a construction of these documents (that is to say, the grants made to Bhau Maharaj by Sir T. Munro in 1818, confirmed by the Honourable Mountstuart Elphinstone), we should have considerable difficulty in saying that they were meant to convey more than the revenue arising from the village. But the disposal of the present case is to be governed by wholly different considerations—considerations which we cannot but think would have had a decisive effect in the District Court, had they been duly pressed upon the attention of the Judge presiding there. The rights of the inamdar have been weighed and adjudicated on by the Inam Commissioner under Act 11 of 1852. The duty of that officer, as laid in R. 1, Sch. A to the Act, 'is to investigate . . . the titles of persons holding or claiming against Government the possession or enjoyment of an inam or jahagir, or, any interest therein, or claiming exemption from the payment of land revenue.' According to S. 7 of the Act no decision or order of the Inam Commissioner . . . shall be questioned or avoided in any Court of law."

The judgment of the Inam Commissioner in that case was in exactly similar terms as the decision in this case except that additional words *baki darobast gav chavara* were used in that case which are translated by the learned Judge "let the whole remainder of the village continue" (in the enjoyment or possession of the inamdar's family). But otherwise the decision of the Inam Commissioner was that the village excluding the ancient hakdars and inamdars, should be continued as inam in the grantee's family so long as their male descendants were alive, and the learned Judges came to the conclusion that that was more than a grant of the revenue. When therefore, with express reference to a rule applicable only to lands, he says that, saving particular charges, the whole village is to go on, or for the future to be in the possession or enjoyment of the inamdar's family, we must necessarily construe this order as adjudging the lands and not merely the revenue of the village to the claimant. I think this case must be decided according to the decision in *Vasudev Pandit v. Collector of Puna* (1) and that therefore no certificate was necessary under S. 4, Pensions Act. The result must be that the decision of the learned District Judge must be set aside, and the case must be remanded to him for trial on the merits. The appellant will have the cost of the appeal and the costs in the lower appellate Court.

(1) [1879] 10 B. H. C. R. (A. C. J.) 471.

Heaton, J.—We are only at present concerned with the question whether a certificate under the Pensions Act is necessary. According to the practice and rulings of this Court, if there is a grant of the royal share of the revenue and nothing more, and a claim arises in relation to that grant the claim cannot be heard by a civil Court without a certificate, for so it is provided by S. 4, Pensions Act. But if there is a grant of something other than merely the royal share of the revenue, or, at any rate, if there is a grant of the village as a holding or estate, then a certificate under the Pensions Act is not necessary. I use the expression "the grant of a village as a holding or estate," in preference to the words commonly used "the grant of the soil," because they seem to me to express more accurately and more consonantly with the usage in this part of India what is actually conferred. A great many grants, now called inam, were really grants of villages in management and I think the idea of a grant of the management is far more prevalent here in Western India, than is the English idea of an absolute grant of the soil. But however that may be, we clearly have in this case something much more than a mere grant of the royal share of the revenue. That I think, is apparent from the words in Ex. 82, by themselves. When we refer to the case of *Vasudev Pandit v. Collector of Puna* (1), I think we find authority for saying that a decision in a case of this kind (where a village is held for many years by Wahi-watdars), that the village is to be continued, indicates a grant of something very much in excess of the royal share of the revenue. It seems to me therefore that in this case a certificate under the Pensions Act is not necessary and that the appeal must, as proposed, be remanded to be decided on the merits.

G.P./R.K.

Case remanded.

A. I. R. 1920 Bombay 101 (1)

MACLEOD, C. J.

Jankibai Ramdayal—Defendant—Appellant.

v.

Chimna Sadashiv Vani — Plaintiff—Respondent.

Second Appeal No. 179 of 1918, Decided on 11th December 1919, from decision of Dist. Judge, Khandesh.

Civil P. C. (5 of 1908), O. 34, R. 5—Appeal from final decree under R. 5—Court-fee is payable on decretal amount—Court-fees Act (7 of 1870), S. 7.

An appeal from a final decree passed under O. 34, R. 5, requires an ad valorem court-fee on the decretal amount, and cannot be stamped as an appeal from an order. [P 101 C 2]

B. G. Rao—for Appellant.

S. Y. Abhyankar—for Respondent.

Judgment.—In this case a preliminary decree was passed against defendant 5 in a mortgage suit after the case had been taken up to the High Court. As defendant 5 failed to pay the amount mentioned in the preliminary decree, the plaintiff applied under O. 34, R. 5, for a decree absolute for sale, and a final decree was passed on 29th June 1917. Defendant 5 then filed an appeal against that decree absolute and claimed to be allowed to file the appeal on an eight-anna stamp. The District Judge held that the court-fees must be paid ad valorem on the decretal amount. The appellant was given 15 days within which to pay. A second appeal has now been filed against that order, and it is difficult to see on what the defendant's contention is based. The decree passed under O. 34, R. 5, is a final decree in the suit. It stops the litigation and if a party to that decree chose to file an appeal, it must be treated as an appeal for the purposes of court-fees like any other appeal from a final decree. This question was raised before a Full Bench at Allahabad: see *Bajranji Lal v. Mahabir Kunwar* (1). It was there held that an appeal from a final decree passed under O. 34, R. 5, Civil P. C., 1908, required an ad valorem court-fee and could not be stamped as an appeal from an order. I agree with that decision and the appeal is dismissed with costs.

G.P./R.K.

Appeal dismissed.

(1) [1913] 35 All. 476=21 I. C. 498 (F.B.).

A. I. R. 1920 Bombay 101 (2)

SHAH AND HAYWARD, JJ.

In re Rajasaheb Rasulsahab.

Criminal Revn. Appln. No. 26 of 1919, Decided on 20th June 1919, from order of Sess. Judge, Bijapur.

Mahomedan Law — Divorce — Pronouncement need not be made in wife's presence.

There is no provision of the Mahomedan law requiring that a divorce should be pronounced in the presence of the wife or that it should be immediately communicated to her. All that is necessary is that the fact of the divorce having

been effected should be brought to the notice of the wife. [P 102 C 1, 2]

H. B. Gumaste—for Applicant.

V. D. Limaye—for Respondent.

Shah, J.—The parties to this application are Mahomedans. The wife applied to the Magistrate in the first instance for maintenance for herself and her daughter. An order was made by the Magistrate under S. 488, Criminal P. C., on 22nd July 1918, awarding her Rs. 10 per month for their maintenance. The husband executed a talaknama, on 14th August 1918 in the presence of witnesses and that document was registered. Subsequently, on 4th December 1918, he made an application to the Magistrate for the cancellation of the said order in favour of his wife on the ground that he was no longer bound to maintain her. The learned Magistrate was of opinion that the talaknama was not valid as it was not made in the presence of a Kazi and that there was no ground to cancel his previous order.—The husband then applied to the Sessions Court. But that Court refused to take any action on his application, though it was of opinion that the talaknama was valid. He has now applied to this Court for the revision of the order made by the Magistrate on the ground that the talaknama is valid and that the amount of maintenance should be reduced proportionately.

I am of opinion that the talaknama is valid accordingly to Mahomedan law. It is true that it was not made before a Kazi, that it was not made in the presence of the wife, and that no attempt appears to have been made immediately on the execution of the talaknama to communicate it to her. It is clear however on these proceedings that this talaknama came to the notice of the wife at the latest when the husband made the present application for the cancellation of the previous order for maintenance.

Mr. Limaye appearing for the wife has contended that the talaknama is not valid, as no attempt was made immediately to communicate the same to the wife. He has not however been able to cite any authority in support of this proposition; and all that appears necessary is that the fact of the talak having been effected must come to the notice of the wife. There is nothing to show that it must be brought to the notice of the wife within a particular time from the date

on which it is executed. In the present case the talaknama came to her knowledge within a reasonable time from the date of its execution; and that seems to be sufficient to satisfy the requirements of the Mahomedan law. The observations in *Sarabai v. Rabiabai* (1), *Ful Chand v. Nawab Ali Chowdhry* (2) and *Asha Bibi v. Kadir Ibrahlim* (3) bearing on the point support this view: I am therefore unable to agree with the Magistrate that the talaknama is invalid.

Taking the talaknama to be valid, the question is whether any case for the reduction of the amount of maintenance is made out. The talaknama states in terms that one of the reasons for the divorce was the fact that the wife had obtained an order for maintenance. The child whose maintenance is obligatory upon the present petitioner is said to be about three years old. The mother is entitled to the custody of the child and it is not disputed before us, and indeed it cannot be disputed, that the petitioner is bound to provide adequate maintenance for the child. No doubt at first sight it would appear that some reduction might fairly be made in favour of the petitioner. But having regard to the circumstances under which this talaknama came to be executed and to the necessity of keeping the child with the mother, I do not think that any reduction would be appropriate.

On these grounds I would not reduce the amount of maintenance which was awarded in the first instance for the wife and the child, but would allow that order to stand making it clear that it is for the maintenance of the child only.

I would discharge the rule.

Hayward, J.—I concur that no reason has been shown for reducing the maintenance granted by the Magistrate. It is true that that maintenance was granted both for the infant child and the wife, but it would in my opinion, only be sufficient for the maintenance of the infant child even if supported by the opponent not as a wife but as a third party, as pointed out by the learned Sessions Judge.

It has been argued that the wife has been duly divorced and is therefore in the position of a third party. It is not strictly necessary in the view taken of

(1) [1906] 30 Bom. 537=3 Bom. L. R. 35.

(2) [1909] 36 Cal. 184=1 I. C. 740.

(3) [1909] 33 Mad. 22=3 I. C. 730.

the sufficiency of the maintenance to decide the question. There is however a clear divorce in writing registered, which could leave no doubt whatever as to the intention to divorce the wife. It is also clear that knowledge of this intention was brought to the notice of the wife not many months afterwards by these very proceedings taken before the Magistrate. It seems to me that the divorce was wrongly held to be invalid by the Magistrate and that the correct view of the matter was taken by the learned Sessions Judge. It would appear that there is no provision requiring that the divorce should be pronounced in the presence of the wife or that it should be immediately communicated to her under Mahomedan law, and these views find support in the recent decision in *Sarabai v. Rabiabai* (1) in this Court, which was approved by the Calcutta High Court in the case of *Eul Chand v. Nawab Ali Chowdhry* (2) and by the Madras High Court in the case of *Asha Bibi v. Kadir Ibrahim* (3).

The rule therefore should in my opinion, be discharged.

G.P./R.K.

Rule discharged.

A. I. R. 1920 Bombay 103

MACLEOD, C. J.

Trimbak Ganesh Karmarkar — Defendant—Appellant.

v.

Pandurang Gharojee Shetye — Plaintiff—Respondent.

Second Appeal No. 958 of 1918, Decided on 11th December 1919, from decision of Dist. Judge, Ratnagiri, in Appeal No. 157 of 1918.

Hindu Law—Joint family—Vendee from co-parcener can sue for partition—He is not entitled to past profits.

A purchaser from a member of a Hindu joint family of his share in the family property is entitled to get his share by partition, but is not entitled to past profits. [P 103 C 2]

S. D. Limaye—for Appellant.

A. V. Desai—for Respondent.

Judgment.—The plaintiff sued to recover his two-fifths share in the plaint property by partition with three years' profits, Rs. 240 plus Rs. 80 for damages on account of trees cut down by the defendants. There were five brothers, two of whom Mahadev and Ramchandra sold their shares to the plaintiff on 30th April 1914 and 10th February 1917 respectively. The trial Court ordered that the plain-

tiff should recover two-fifths share by a fair and equitable partition and by metes and bounds as well as Rs. 63 for past profits and at Rs. 42 per year since 1917 till delivery of possession by partition besides Rs. 60 for damages. An appeal from this order was summarily dismissed.

Defendants 1 and 2 have appealed and have confined their objections to that part of the order which directs them to pay Rs. 63 as past profits to the plaintiff. It is contended for the plaintiff that he stands exactly in the shoes of his vendor, and that if he is excluded from the joint family property he is entitled in a suit for partition to ask for a share in the mesne profits before the suit. It may be that in a suit between co-parceners for partition, if any members of the co-parcenership prove that they had been excluded from the family property in a partition suit, they might get a decree for past mesne profits. As stated by Melvill, J., in *Konerrav v. Gurav* (1):

"Where one member of the family has been entirely excluded from the enjoyment of the property, there might be good grounds for ordering an account: but in the ordinary case of joint enjoyment by the members of the whole property, or of enjoyment by different members of different portions of the property, the taking of an account would be most difficult and unsatisfactory, and we are not aware of any case in which the Courts have ever ordered it."

But a purchase from a member of an undivided family is in a different position. The other co-parceners are not bound to recognize him in any way, and he could only exert his rights against them under his sale deed from their co-parcener by filing a suit for partition. I do not think it has been ever held that any member of a Hindu joint family is entitled to bring in a stranger into the family and insist upon the other co-parceners treating him as a member of the family. But as unfortunately the Courts have recognized the rights of a member of a joint family to sell his share, then the purchaser is entitled to get his share by partition. But it is certainly not desirable that his rights should be extended in any way further as if by his purchase he stood for all purposes exactly in the shoes of his vendor. Therefore the decree of the trial Court must be amended by striking out that portion which allows Rs. 63 for past profits.

(1) [1880-81] 5 Bom. 589.

The appellant will get his costs in proportion to his success. The rest of the appeal is dismissed with costs. Cross-objections dismissed with costs.

G.P./R.K.

Decree modified.

A. I. R. 1920 Bombay 104

MACLEOD, C. J. AND HEATON, J.

Bhagwan Bhau Indap and others—Defendants—Appellants.

v.

Krishnaji Ganoji Indap—Plaintiff—Respondent.

Second Appeal No. 1045 of 1918. Decided on 29th January 1920, from decision of Dist. Judge, Ratnagiri, in Appeal No. 39 of 1918.

Specific Relief Act (1 of 1877), S. 27 (c), Illus. (2)—Illustration refers also to co-parceners of joint Hindu family—Contract of sale of father's share can be enforced against sons after father's death.

The second illustration to Cl. (c), S. 27, Specific Relief Act, must be taken to refer, not merely to joint tenants in the English sense, but to co-parceners in a joint Hindu family.

Therefore, where the father of a joint Hindu family contracts to sell his share in the family property and dies, the purchaser might enforce specific performance of the contract against the sons of the vendor. [P 104 C 2]

B. V. Desai—for Appellants.

S. R. Parulekar for *A. G. Desai*—for Respondent.

Macleod, C. J.—The plaintiff sued to obtain specific performance of an agreement to sell the plaint property passed between him and one Bhau Indap, dated 7th July 1916. The plaintiff had paid Rs. 20 to Bhau, the contract clearly being a contract for sale to the plaintiff of Bhau's interest, which was three pies in the joint family property. Before the sale could be completed Bhau died, and the suit is brought against his sons for specific performance. Defendant 3 paid Rs. 20 into Court, the sum which had been paid to his father, and the trial Court directed that the plaintiff should receive that amount, and his claim for specific performance was refused. In the lower appellate Court this decree was reversed, and the plaintiff's suit was decreed. The respondent relies on S. 27, Specific Relief Act, Cl. (c), Illus. 2 to that clause. It is difficult at first sight to see how that illustration fits in with Cl. (c). I think the argument is this: that if *A* and *B* are joint tenants of joint family property, *A* has the expectation of succeeding on the

death of *B* to the whole, and *A*, therefore may be said, though somewhat inaccurately, to have a title to that undivided moiety, although that title, whatever it may be called, is liable to be displaced by *B*. That seems to be the argument, although it is not perfectly clear how *B* can displace *A*'s title, for the only thing that could happen to prevent *A* succeeding to *B*'s half would be the event of *A* dying before *B*. In that way it may be said that *B* would be displacing *A*'s title. However that may be, the illustration distinctly covers the case of one joint tenant agreeing to sell his undivided moiety, and then dying, for it states that his purchaser could bring a suit for specific performance against the survivor, and unless we place co-parceners in a joint Hindu family in a different category to joint tenants, we should have to hold that the illustration is binding upon us. The illustration itself is perfectly clear. There is no ambiguity about it, and there is no reason why we should not follow it in the case of all joint tenants, whether members of a joint Hindu family or not. If we did not do so a certain amount of uncertainty would arise in future, and it is always desirable to avoid that. In my opinion therefore the decision of the lower appellate Court must be upheld and the appeal must be dismissed with costs.

Heaton, J.—I think Illus. 2 to Cl. (c), S. 27, Specific Relief Act, must be taken to refer, not merely to joint tenants in the English sense, but to co-parceners in a joint Hindu family. I think so, because the Specific Relief Act is applicable to India and enacted for India, where the majority of the population are Hindus and throughout the whole of which country the idea of a joint Hindu family is well understood. But I rather regret that it is so for this reason we have to decree specific performance; and what will be the result? The result will be that the plaintiff will obtain a transfer to himself of a 3 pies share in a certain property. He will have no right to joint enjoyment of that property and he will be unable to obtain separate possession of it without bringing a suit for partition. So that we are giving the plaintiff a decree which, at best, in all human probability, will only lead to further disagreement and further litigation. That is not the kind of case in which I personally

should be disposed to decree specific performance. But the legislature have thought otherwise, and after all our own personal views are nothing, the intentions of the legislature everything. I think therefore that the appeal must be dismissed with costs.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1920 Bombay 105 (1)

MACLEOD, C. J. AND HEATON, J.

Ganesh Shesho Deshpande—Plaintiff—Appellant.

v.

Secretary of State and others—Defendants—Respondents.

First Appeal No. 36 of 1917, Decided on 10th November 1919, against decision of Dist. Judge, Satara, in Suit No. 5 of 1915.

Limitation Act (9 of 1908), Art. 14—Suit to set aside Collector's order of forfeiture must be brought within one year.

Where a Collector orders the forfeiture of land for failure to pay arrears of assessment the party aggrieved may content himself with the various appeals allowed to the revenue authorities, but if he brings a suit to set aside such order the suit must be brought within one year of the date of the order as prescribed by Art. 14. [P 105 C 2]

S. R. Bakhale—for Appellant.

S. S. Patkar and P. B. Shingne—for Respondents.

Macleod, C. J.—This was a suit filed by the plaintiff for a declaration that the proceedings of the revenue authorities in respect of the forfeiture of his Survey No. 138 at Mahuli, Taluka Khanapur, and in respect of its subsequent disposal, were illegal and ultra vires and not binding on the plaintiff. The suit was dismissed by the learned trial Judge who has discussed the numerous points of law which were raised by the plaintiff, and has given expression to his conclusions in a really very excellent judgment. It does not seem necessary for us to deal with the case at any great length, as we fully concur in everything which has been said by the learned District Judge. The order of forfeiture was made on 6th May 1911, and under Art. 14, Lim. Act, the party aggrieved by that order had one year within which to file a suit to set it aside. It is quite true that the party aggrieved need not apply to the Court. He may content himself with the various appeals allowed to the revenue authorities, until he reaches the Governor in Council. But the Limita-

tion Act provides, if he wishes to have resort to the Court in order to get the order of the revenue authorities set aside, then he must put his plaint on the file within one year. It has often been argued that if the party aggrieved is appealing to the revenue authorities, that time should be excluded. S. 11, Revenue Jurisdiction Act, makes it clear that that argument cannot be sustained. If therefore the plaintiff in this case wished to have a decision of the Court upon the legality or illegality of the order of forfeiture he was bound to put his plaint on the file within one year of the date of the order. He has not done so. Therefore it is clear that the suit was barred by limitation. The appeal is dismissed with costs.

Heaton, J.—I agree. Whether this is a case of hardship or not it is not for us to decide. I agree with my Lord the Chief Justice that the District Judge has dealt correctly both with the matters of law and the matters of fact which came before him. Therefore, it suffices for us to say that this is so, for that concludes the case inasmuch as it demonstrates that the plaint was time barred. If the appellant thinks he has a genuine grievance his only remedy is to approach Government, and if he does so, he will find from the judgment of the District Judge a very clear statement of the facts of this case, the facts necessary to be presented to the Government.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1920 Bombay 105 (2)

SHAH AND HAYWARD, JJ.

Balkrishna Narayan Sawant—Plaintiff—Appellant.

v.

Jankibai Sitaram Sanzgiri and others—Defendants—Respondents.

First Appeal No. 172 of 1916, Decided on 16th September 1919, from decision of First Class Sub-Judge, Ratnagiri, in O. S. No. 319 of 1913.

(a) Court-fees Act (7 of 1870), S. 7 (4) (c)—Valuation of suit for declaration and consequential relief is at plaintiff's option—That valuation determines jurisdiction.

A plaintiff in a suit for a declaration and for an injunction by way of consequential relief has the right to put his own valuation on the claim for purposes of court-fees under S. 7, Cl. (iv) (c), Court-fees Act, and under S. 8, Suits Valuation Act, the same value must determine the value for the purpose of jurisdiction.

[P 106 C 2, P 107 C 1]

(b) Suits Valuation Act (7 of 1887), S. 8—In a suit for declaration and consequential relief valuation for jurisdiction made higher than for court-fee—Plaintiff-appellant contending that valuation for jurisdiction must be taken to be same as for court-fee—Valuation for jurisdiction in suit held correctly stated.

In a suit for a declaration and for an injunction by way of consequential relief the plaintiff valued the claim at Rs. 135 for purposes of court-fees and at Rs. 16,000 for purposes of jurisdiction. The suit was heard by a First Class Subordinate Judge under his special jurisdiction and was dismissed. Plaintiff filed an appeal in the High Court. On the appeal coming on for hearing, the plaintiff-appellant raised a preliminary point that the value of the claim for purposes of jurisdiction must be taken to be Rs. 135 in accordance with the provision of S. 8, Suits Valuation Act, and that the appeal accordingly lay to the District Judge and not to the High Court.

Held: that under the circumstances of this case, it must be held that the valuation was incorrectly stated for court-fees and correctly stated for purposes of jurisdiction and that the appeal therefore lay to the High Court. [P 109 C 1]

G. S. Rao and A. G. Desai—for Appellant.

Jayakar, G. S. Mulgaonkar, P. B. Shingne, T. N. Walavalkar and V. S. Santgiri—for Respondents.

Shah, J.—In this appeal, a preliminary point has been raised on behalf of the appellant that the appeal lies to the District Court, and not to this Court, and that the memorandum of appeal should be returned to him now to be presented to the District Court.

It will be convenient to state the facts bearing on this point. One Sitaram left his native place for Benares in 1902: he has not been heard of since and is presumed to be dead. There were disputes as to his property in the hands of third persons: the claimants were his widow, Jankibai, his brother Narayan, and his nephew Balkrishna (Narayan's son). The widow claimed as an heir, the brother by survivorship on the footing that he and Sitaram were joint, and the nephew under the will of Sitaram. Janakibai filed a suit in 1913 on the original side of the High Court against the stakeholders, to which other claimants were added as parties later on. This suit was ultimately transferred to the Court of the First Class Subordinate Judge at Ratnagiri to be tried along with the two other suits, which were filed in that Court by the brother and the nephew respectively. The brother filed Suit No. 319 of 1913 against the widow and the stakeholders for a

declaration that he was jointly interested in the property of Sitaram and for an injunction restraining defendants 1 and 2 (the widow and her brother) from receiving, and defendants 3, 4 and 5, the stakeholders) from handing over to them the property of Sitaram. Other minor reliefs claimed by him are not material. He valued the claim for the declaration and the injunction at Rs. 135 (Rs. 130 for declaration and Rs. 5 for injunction) for the purpose of court-fees. He stated that the value of the subject-matter for the purpose of jurisdiction was about Rs. 16,000. This suit was filed under the special jurisdiction of the First Class Subordinate Judge of Ratnagiri, and not under his ordinary jurisdiction. The other suit was filed by Balkrishna against the widow and other defendants. That also was a suit for a declaration and an injunction, the valuation for the purpose of court-fees being Rs. 135, and the value of the subject-matter of the suit for the purpose of jurisdiction being over Rupees 5,000. This also was a suit filed under the special—and not the ordinary—jurisdiction of the First Class Subordinate Judge. These two suits and the widow's suit transferred to that Court were tried and decided together. Several appeals have been filed from the different decrees to this Court. Narayan, whose suit was dismissed, has filed the present appeal, which, it is now contended, lies to the District Court. In Balkrishna's suit the widow has appealed to this Court on the merits, and Balkrishna has appealed as to costs. We are not concerned with the appeals in the widow's suit as regards this preliminary point.

It is significant that Narayan alone raises the point of jurisdiction in his appeal. The point, if good, equally affects the two appeals arising out of Balkrishna's suit. The appellants in those two appeals do not raise this point. On the contrary the widow contends that the appeals are properly filed in this Court. I shall deal with the preliminary point in this appeal in which it has been raised: for if it fails here, it must fail as regards the appeals arising out of Balkrishna's suit.

There can be no doubt that it is open to the plaintiff to put his own valuation on the claim for the purpose of court-fees under S. 7, Cl. (iv) (c), and that in the present case he purported to value in

at Rs. 135. It is also clear that under S. 8, Suits Valuation Act, 1887, the same value must determine the value for the purpose of jurisdiction. The decisions of this Court are to the same effect: and the course of the decisions on this point has been approved by the Privy Council recently in *Sunderbai v. Collector of Belgaum* (1). An attempt has been made on behalf of the widow to show that the present case is governed by the decision in *Rachappa Subrao v. Shidappa Venkatrao* (2). But I think that the injunction relates to the whole property, in respect of which the declaration is sought, and is a proper consequential relief. The suit therefore falls under Cl. (iv) (c), S. 7, Court-fees Act. I do not see how the present case can be treated on the same footing as the case of *Rachappa Subrao v. Shidappa Venkatrao* (2).

If the matter rested there, it would follow that the appeal would lie to the District Court and we would be bound to give effect to the contention that the appeal lies to the District Court, even though that conclusion would involve a further delay for no useful purpose in the disposal of these appeals.

The facts of the case are somewhat peculiar, and, on the particular facts of the case, I think the plaintiff should not be allowed to contend that the true value for the purpose of court fees is Rs. 135. It is clear from the plaint that he filed the suit in the Court of the First Class Subordinate Judge with a definite allegation that the suit was filed under the special jurisdiction of the Court as the value of the subject-matter for that purpose was about Rs. 16,000. The value for the purpose of court-fees was stated to be Rs. 135. If the lower Court had considered the question of court-fees and jurisdiction, as it should have, after the plaint was filed, the inconsistency between the two statements would have been realized and the plaintiff would have been at once called upon either to amend the value for the purpose of court-fees so as to bring the case within the special jurisdiction of the Court, or to take back the plaint to be presented to the Court of the Second Class Subordinate Judge at Malvan, which would have jurisdiction

to entertain the suit on the basis of the value for court-fees being Rupees 135. That was not done. The defendants raised no objection as to the deficiency of court-fees or want of jurisdiction. The result was that the suit of 1913 was tried by the First Class Subordinate Judge and decided by him in 1916, on the footing that it was a suit within his special jurisdiction as contemplated by S. 25, Bombay Civil Courts Act (14 of 1869). The plaintiff took advantage of the trial of the suit by a Court of higher jurisdiction and he followed it up with an appeal to this Court in 1916 on the same basis. All these appeals are now ready for hearing; and for the first time it is urged on behalf of the plaintiff that the value of the court-fees as mentioned in the plaint is the true value for the purpose of jurisdiction also. The point now urged suggest not only want of jurisdiction in this Court to entertain the appeal, but also want of jurisdiction in the trial Court. Not only the plaintiff Narayan, but other parties to this litigation and the lower Court, have acted upon the allegation in the plaint that the true value of the subject-matter of the suit is over Rs. 5,000. It is inconsistent with the value of the claim for the purpose of court-fees being only Rs. 135. The inconsistency might have been removed if it had been noticed in time by the plaintiff amending the value of his claim for the purpose of court-fees or that for the purpose of jurisdiction. Under the circumstances I think that the plaintiff can be fairly taken, and ought to be taken, to have really valued his claim for the purpose of court-fees not at Rs. 135 as he has apparently done, but at a sum exceeding Rs. 5,000, as he has himself acted and induced others to act on that basis. He cannot be allowed to use either of these inconsistent valuations in different Courts according to his convenience. At this stage he can be properly held to have valued his claim for court-fees and jurisdiction at Rs. 16,000 or at some figure exceeding Rs. 5,000.

It may be that he has not paid sufficient court-fees from this point of view: but we are not now concerned with the question of sufficiency of court-fees either for the plaint or for the memorandum of appeal. We are concerned with the question of jurisdiction. On the special

(1) A. I. R. 1918 P. C. 185=48 Bom. 376=46 I. A. 15=52 I. C. 897 (P.C.).

(2) A. I. R. 1918 P. C. 183=48 Bom. 507=46 I. A. 24=50 I. C. 280 (P.C.).

facts of this case I am of opinion that the plaintiff must be taken to have filed the suit properly in the Court below under its special jurisdiction, and to have filed the appeal properly in this Court. The appeal must therefore be heard on the merits. It follows that Appeals Nos. 177 and 218 of 1916 have been properly filed in this Court and must be heard on the merits.

I have reached this conclusion on the special facts of this case, and desire to make it clear that I do not mean to depart in the slightest degree from the recognized rule, to which I am bound to give effect, that the plaintiff has the right to value his claim for the purpose of court-fees in a suit for a declaration and for an injunction by way of consequential relief, and that the value for the purpose of jurisdiction is the same. In this particular case I hold that the plaintiff must be taken to have really valued the claim for the purpose of court-fees at about Rs. 16,000, though in terms he purports to put a different and lower value.

First Appeal No. 72 is not pressed on the merits, and is therefore dismissed.

Respondent 1 to get her costs from the appellant, the other respondents to bear their own costs.

We see no reason to disturb the order made by the trial Court as to costs of the stakeholders.

We dismiss the cross-objections of respondent 3 with costs.

Hayward, J.—I concur with the conclusions and have only a few words to add to the reasons of my learned brother.

Narayan, the father, and Balkrishna, the son, both brought suits for declarations and injunctions against the widow of the last holder for property worth Rupees 15,000 in the hands of stakeholders. These suits were filed the same day and were Suits Nos. 319 and 321 of 1913 in the Court of the First Class Subordinate Judge of Ratnagiri. They appear to have assessed their claims for declarations at Rs. 130 and injunctions at Rs. 5, and thereon to have paid Rs. 10-6-0 as court-fees. But at the same time they stated definitely that the value of the property was some Rs. 15,000 and that the suits were therefore not within the jurisdiction of the Second Class Subordinate Court of Malvan, but were within that of the First Class Subordinate

Court of Ratnagiri. It is difficult to follow the precise method by which they arrived at Rs. 10-6-0 as the appropriate court-fees. If they had treated the claims for declarations separately, it would not have been necessary to have given them any value. If however they had valued them and did so at Rs. 130 for the purposes of ad valorem fees, then the appropriate fees would have been Rs. 9-12-0, while the ad valorem fees for claims for injunctions valued at Rs. 5 would have been annas 6, making a total of Rs. 10-2-0 as the appropriate court-fees. If on the other hand they had treated, as they ought logically to have done the claims as claims for declarations with injunctions valued at total sums of Rs. 135, then Rs. 10-8-0 would have been the appropriate ad valorem court-fees. But they neither paid Rupees 10-2-0 nor Rs. 10-8-0. They fixed on the intermediate sums of Rs. 10-6-0 and they paid those sums without specific explanations as the court-fees so that even on their own showing they did not pay the right court-fees in accordance with S. 7, C. 4, and Sch. 2, Art. 17, Cl. 3, Court-fees Act, 1870.

They then proceeded apparently to make a further mistake and to overlook the provision that the valuation for court-fees must be deemed the same as the valuation for jurisdiction under S. 8, Suits Valuation Act, 1887. For they valued their suits at Rs. 15,000 for the purposes of jurisdiction: and upon that valuation they deliberately brought their suits not in the Court of the Second Class Subordinate Judge of Malvan, but as no doubt suited them better, in the Court of the First Class Subordinate Judge of Ratnagiri. They must have been aware at the time they selected the trial Court that an appeal from the former would lie to the District Court of Ratnagiri and an appeal from the latter would lie to this High Court. It is clear that they did realize this and that they had deliberately filed their suits accordingly, because Narayan, the father, proceeded to file Appeal No. 172 of 1916 in this High Court, and no objection was taken by Balkrishna, the son, to the widow filing her Appeal No. 177 of 1916 also in this High Court. It is only now some three years later, that they have denied practically the jurisdiction both of the trial Court and the appellate juris-

diction of this High Court. It seems to me that in these circumstances the only possible course is to hold that they were wrong in their statements as to the valuations for court-fees, which in any case were incorrect according to the amounts actually paid as court-fees and which were directly opposed to the actual valuation of the property in the suits, upon which valuation they had deliberately brought their suits in the superior Court of the First Class Subordinate Judge of Ratnagiri and had brought their appeals or suffered the appeals to be brought in this High Court. The proper course therefore in my opinion must be to hold that the valuation in both the suits was incorrectly stated for court-fees and correctly stated for the purposes of jurisdiction both of the trial Court and of this High Court.

It seems to me further to hold otherwise would lead to a most unfortunate result. Owing to the technical course which would have to be followed in order eventually to bring these appeals for final decision in this High Court, there would ensue a further serious delay which might extend to years before the widow would succeed, if she be entitled to succeed, in establishing her rights to this large sum of money in this High Court. To allow such a result would, in my opinion, be encouraging an abuse of the proceedings both of the First Class Subordinate Court of Ratnagiri and of this High Court, and it is in my opinion our incumbent duty to prevent any such abuse under the powers inherent in us under S. 151, Civil P. C.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1920 Bombay 109**

MACLEOD, C. J. AND HEATON, J.

Chhanubhai Mansukh — Defendant—Appellant.

v.

Dahyabhai Govind—Plaintiff—Respondent.

Civil Appeal No. 40 of 1918, Decided on 23rd November 1919, from order of Small Cause Court Judge, Ahmedabad, in Appeal No. 189 of 1916.

Civil P. C. (5 of 1908), O. 23, R. 1—Appellate Court is competent to allow withdrawal of suit.

When an appeal against an order dismissing a suit has been admitted, and when both parties are represented before it, an appellate Court is competent to allow the plaintiff to withdraw

his case on proper terms with liberty to bring a fresh suit. [P 109 C 2]

G. N. Thakor—for Appellant.

J. G. Rele—for Respondent.

Macleod, C. J.—This appeal deals with the question whether an appellate Court can allow a plaintiff appealing against an order dismissing his suit to withdraw his suit with liberty to bring a fresh suit. In this case the plaintiff had brought a previous suit which was dismissed. On appeal, when the respondent was duly represented by his pleader, the appellate Court allowed a withdrawal and recorded its reasons for so doing. Now, when the plaintiff has brought this suit, he is met with the plea of *res judicata*. The plea is based on the argument that the appellate Court had no jurisdiction to allow the plaintiff to withdraw the previous suit with liberty to bring a fresh suit. The appellant has relied upon a decision of this Court in *Eknath Banoji v. Ranoji Bawaji* (1). There the facts were that the appeal had not been admitted, and before the admission the Court in effect set aside the decree dismissing the suit and allowed the plaintiff to withdraw his suit. Clearly the appellate Court had no jurisdiction to deal with the order of the lower Court because the appeal had not been admitted. Once the appeal is admitted, then the whole of the case is reopened. The suit is still proceeding, and the Court has jurisdiction to allow a party to withdraw his case at any time during the continuance of the proceedings, provided of course it proceeds in the proper way and hears both parties. It cannot be said that an appellate Court has no jurisdiction to deal with the case in whatever way it pleases. Its decision may be wrong, but that is not a question of jurisdiction. I cannot see myself why an appellate Court cannot, when an appeal has been admitted, and when both parties are represented before it, allow the plaintiff to withdraw his case, on proper terms, and allow him to start afresh. The appeal is dismissed with costs.

Heaton, J.—I concur.

G.P./R.K.

Appeal dismissed.

(1) [1911] 35 Bom. 261=10 I. O. 813.

A. I. R. 1920 Bombay 110

MACLEOD, C. J. AND HEATON, J.

Girijabai Shambhudixit Athavale — Plaintiff—Appellant.

v.

Sadashiv Vishwanath Joglekar—Defendant—Respondent.

First Appeal No. 283 of 1917. Decided on 26th January 1920, from decree of Asst. Judge, Dharwar, in Suit No. 10 of 1917.

(a) Limitation Act (9 of 1908), Art. 119—For interference within Art. 119 there must be some act incompatible with recognition of adoption.

In order to prove that there was interference with the rights of an adopted son within the meaning of Art. 119, it must be established that something was done which was incompatible with the recognition of the adoption.

[P 111 C 2]

(b) Evidence Act (1 of 1872), S. 115—Mere erroneous belief does not operate as estoppel.

The mere fact that a person shares an erroneous belief with other persons does not give rise to estoppel.

K adopted S at a time when the latter had a son V living. After the death of S, V succeeded to the estate left by S, and the latter's widow only received maintenance. More than six years but less than 12 years after the death of S, his widow brought a suit to recover the estate left by S on the ground that V was not entitled to succeed to it.

Held: (1) that V's succeeding to the estate of S could not be said to be an interference with the rights of S within the meaning of Art. 119, Sch. 1, Lim. Act, and that therefore the suit was not governed by that article; (2) that the mere fact that the widow of S shared an erroneous belief with V that the latter was entitled to succeed to the estate left by S did not estop the widow from bringing the suit; (3) that therefore the suit was not barred either by limitation or by estoppel.

[P 111 C 1]

Dhurandhar and V. R. Sirur—for Appellant.

Weldon and R. A. Jahagirdar—for Respondent.

Macleod, C. J.—The plaintiff sued to recover possession of the plaintiff property as the widow of one Shambhudixit, who was adopted in 1878 by a family of the name of Athavale. The defendants are the grandsons of Shambhu by their father Vishwanath, who was born in 1877 before the adoption. Therefore according to Hindu law Vishwanath, the son of Shambhu, after Shambhu's adoption into the Athavale family, remained in his father's old Joglekar family. Shambhu died in 1904.

The defendants oppose the plaintiff's claim mainly on two grounds: one of limitation; the other of estoppel. It was

contended that Art. 119 applied, and that although the suit was one to recover possession of the property, the plaintiff, before she could succeed, had to obtain a declaration that her husband's adoption was valid. Therefore she was bound to bring the suit within six years after the rights of Shambhu, the adopted son as such, had been interfered with. The learned Judge found that such interference took place when Vishwanath was entered as the owner of the Athavale estate in the Record of Rights in 1904. Assuming that the plaintiff is bound to obtain a declaration that Shambhu's adoption was valid, we do not think that after his death there could be any circumstances which would amount to an interference with the rights of Shambhu as such adopted son. The facts in *Gangabai v. Tarabai* (1) are somewhat similar. It seems the learned Judges were of opinion that in that case, until the death of the adopted son, it was not suggested that his right as such adopted son had ever been interfered with, and they came to the conclusion that Art. 119 did not apply to the facts of that case. Although the point we have had to decide may not have been actually decided in that case, we certainly think that Art. 119 cannot be applied to the facts of this case, so that the plaintiff, the widow, would have twelve years within which to bring her suit, and admittedly in that case the suit is within time.

The second point on which the defendants succeeded in the lower Court was one of estoppel. It appears that after Shambhu's death Vishwanath and then the defendants were in possession of the property, and in 1913 the plaintiff gave to Vishwanath's widow Umabai a receipt whereby she declared:

"According to agreement, whereby I am to receive Rs. 70 for my maintenance, I have this day received in all Rs. 33 for the year 1885 Pramadi. The balance to be paid by you is Rs. 36."

No doubt at that time it appears that the plaintiff thought that she was only entitled to maintenance. It is suggested that she thereby induced the defendants to give up any rights that they might have had to the Joglekar property by representing that they were entitled to succeed to the Athavale property on the death of Shambhudixit. There is no evidence whatever even assuming that the

(1) [1902] 26 Bom. 720.

plaintiff had induced them to believe that she had no claim to Shambhu's property; that they acted on such a belief. There is no evidence that there was any Joglekar property, or, if there were, that they made any claim to it, and gave up any rights they had in it, because that they thought that owing to a representation made by the plaintiff they were entitled to Shambhu's property. In the absence of that evidence we do not see how in any event there could be an estoppel. But apart from that there was in this case at best a mistake on the part of the plaintiff, and also of the defendants, with regard to the rights which the Hindu law gave her over her husband's property in the circumstances of the case.

In my opinion therefore the decision of the learned Judge on issues 7 and 8 was wrong, the appeal succeeds and the plaintiff is entitled to the decree which she asked for in her plaint with costs in both the Courts.

Usual order as to costs in the case of a successful pauper appellant.

Heaton, J.—There is no doubt that Shambhu was the adopted son of Krishnadixit. That is found as a fact by the lower Court and has not been contested before us. Shambhu, as such adopted son, succeeded to the property of the Athavale family. He died in 1904. His own son Vishwanath was born before Shambhu's adoption, so that for the purposes of inheritance Vishwanath ceased to be the son of Shambhu after the latter's adoption. He remained a member of his own natural family, the Joglekar family, and never became a member of the Athavale family. Therefore on Shambhu's death, so far as the facts proved tell us, the successor to the Athavale property was the plaintiff, the widow of Shambhu. It happened however that the property actually passed to Vishwanath and his sons, and the plaintiff, the widow, only received maintenance. She signed receipts for this maintenance and accepted the position that I have described.

The plaintiff, so far as her title is concerned, has made good her case, and she is entitled to succeed except for two possible objections, one of limitation and the other of estoppel, which the Court below held to be good objections.

The objection of limitation is based on Art. 119 of the schedule. It is said that seeing that after Shambhu's death in

1904 a Joglekar succeeded to the property, there was an interference with the rights of Shambhu as an adopted son. Now we have been asked to treat the words "rights of the adopted son as such" as meaning the rights of the adopted son during his lifetime. If that is the correct reading, then certainly Art. 119 cannot apply here, because there was no interference with Shambhu's rights as an adopted son so long as he was alive. The interference, if any, came after he died. But setting aside that possibly correct but certainly narrow interpretation of the words, and taking them in their wider sense, I still think the plea of limitation is not made out. If the words be taken in their wider sense, still there must be something done which is incompatible with the recognition of the adoptor; otherwise there cannot be any interference with the rights of the adopted son. Now what was done here was in no sense whatever a refusal to recognize the fact that Shambhu was the adopted son. What was done was based on the acceptance of that fact. It was only because Shambhu was adopted into the Athavale family that Vishwanath, his natural son, could possibly have been allowed to take the Athavale property on Shambhu's death. Therefore there was no interference with the rights of the adopted son but an actual recognition of those rights, and I think that Art. 119 cannot be said to have any application here. The true reason why Vishwanath was allowed to take the property was that everybody concerned misunderstood the law. They thought—I am bound to say I am not the least surprised—that seeing that Vishwanath was the natural son of Shambhu, he would succeed to his natural father's estate when his father died. But, unhappily for Vishwanath, that is not so.

When you have an adoption of a man who has a son alive, the man passes into the family of his adoption; the son remains in his natural family. And seeing that this is the true legal state of affairs here, it seems to me to be opposed also to the point of estoppel. It is perfectly true that the widow, the plaintiff, accepted the position that Vishwanath was to succeed to the property, but in so doing she merely shared in common with the other members of the family an erroneous belief. The sharing with others

of an erroneous belief is not a circumstance from which it can be said that the widow caused or permitted another person to believe that to be true. There was no causing and no permitting in the sense in which those words are used in S. 115, Evidence Act. They shared a mistaken belief in common. And if responsibility for such a mistaken belief is to be attributed to anyone, it certainly ought not to be attributed to the widow.

I agree with the order proposed by my Lord, the Chief Justice.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 112

MACLEOD, C. J. AND HEATON, J.

Bai Jamna and others—Defendants—Appellants.

v.

Dayalji Makanji—Plaintiff—Respondent.

Second Appeal No. 356 of 1918, Decided on 10th November 1919, from decision of Joint First Class Sub-Judge, Surat, in Appeal No. 50 of 1916.

Husband and Wife—Decree for restitution of conjugal rights and injunction against parents not to allow wife to stay with them but directing no execution by detention in prison—Decree held not maintainable—Injunction held improper.

Plaintiff brought a suit against his wife and her parents for restitution of conjugal rights, and obtained a decree and a personal injunction against the parents restraining them from allowing her to live with them; the decree directed that it should not be executed by the detention of the wife in prison;

Held: that as the decree imposed no penalty upon the wife for noncompliance, it could not be maintained and that under the circumstances of the case the injunction against the parents was improper. [P 113 C 1]

*G. N. Thakor—*for Appellants.

*Ratanlal Ranchhoddas—*for Respondent.

Macleod, C. J.—The plaintiff filed this suit against his wife and his wife's parents to obtain a decree for restitution of conjugal rights against his wife, and a personal injunction restraining the parents from obstructing his wife from living with him and from allowing her to live in their house. In the first Court the suit was dismissed. In first appeal the plaintiff got a decree for restitution of conjugal rights, although the Judge directed that the decree should not be executed by detention in prison. The plaintiff was also granted an injunction

restraining defendants 2 and 3 from harbouring defendant 1 in their house.

Now it appears that in 1913 defendant 1 left her husband's house and went to her parents' house for her confinement, and she did not return to live with her husband before the suit was filed in 1915. She has alleged in her defence to the plaintiff's claim that the plaintiff had been guilty of cruelty towards her, whilst she was living with him, and that after she left the plaintiff's house, he had written to her letters of a most indecent description accusing her of the grossest immorality. She therefore said that she apprehended danger to her safety if she returned to the plaintiff's house.

Now the learned first appellate Judge has apparently disregarded the effect of the letters written by the plaintiff after defendant 1 left his house, because they were written after she had gone to her parents' house in the ordinary course for her confinement. He also considered that defendant 1's story as regards cruelty was untrue. That no doubt is a question of fact. But I think the way the first appellate Judge has dealt with the letters written after 1913 has caused him to err in his appreciation of defendant 1's evidence as regards what happened whilst she was living with her husband. Now it is obvious that the plaintiff was an extremely jealous person, and was always accusing his wife whilst she was living with him of immorality, and after she left his house in 1913, his letters were very obscene, and from the nature of those letters I think it may be safely inferred that there may be considerable truth in the defendant's story regarding the plaintiff's conduct while they were living together. In any event it seems clear to me that defendant 1 is justified in saying that she is apprehensive that there will be danger to her health and to her happiness if she returns to live with her husband unless he entirely alters his attitude towards her, of which there does not seem much prospect. The decree as it stands cannot be executed by detention of defendant 1 in prison. The result would be that the decree would be a dead letter. The only effect of it would be to prevent defendant 1 from claiming maintenance from her husband, but her pleader has said that she has no intention of claim-

ing maintenance. If this decree remains on the record it will be an absolute farce.

Then, as regards the order against defendants 2 and 3, that appears to me to be founded on a misapprehension of what was stated by the Court in *Yamunabai v. Narayan Moreshwar Pendse* (1). No doubt, if a woman goes and lives with a stranger in adultery, the husband may have a claim against that man, and may get an order from the Court restraining him from keeping the woman under his roof. But in this case the wife has gone to live with her parents, and if this injunction were to stand, the unfortunate defendant 1 would have nowhere to live. I presume the object of getting that injunction from the Court was to force defendant 1 to go back to her husband, although it was expressly stated that she would not be imprisoned if she disobeyed the order. But if her parents were obliged to turn her out of the house, then it must follow that either she would have to return to her husband, or go to live under the protection of some other person. Therefore in any event I should say this order against the parents restraining them from allowing their daughter to live under their roof was wrong. However that may be, in my opinion it is certainly not desirable, whatever view one takes of the case, that this decree should stand. I think on the merits it should not be allowed to stand, and even if it were good on the merits, it would remain a farce on the very finding of the Court that defendant 1 shall not be compelled to obey it. We therefore think that the decree appealed from should be set aside and the suit dismissed. The husband always has the privilege of paying the wife's costs.

Heaton, J.—I concur.

G.P./R.K. *Decree set aside.*

(1) [1875-77] 1 Bom. 164.

A. I. R. 1920 Bombay 113

MACLEOD, C. J. AND HEATON, J.

Shankar Govind Joshi and others—
Plaintiffs—Appellants.

v.

Parashram Janardhan Gokhale—
Defendant—Respondent.

Second Appeal No. 617 of 1918, Decided on 20th January 1920, from decision of First Class Sub-Judge, Ratnagiri, in Appeal No. 342 of 1916.

1920 B/15 & 16

Bombay High Court Circulars R. 69 (7)—Rule 69 (7) provides that when Hindu son's interest is to be sold along with his father (judgment-debtor) it must be so mentioned in proclamation—Proclamation that son's interest not to be sold but certificate of sale wrongly including it—Son's share held did not to pass.

Rule 69 (7) of the Bombay High Court Circulars provides that if in the case of a Hindu judgment-debtor it is desired to sell the interest of any other member of the family (e. g., that of a minor son or brother) the name of such member and the fact that his interest is being sold must be stated in the proclamation as otherwise his interest will not pass to the purchaser.

Where therefore in an execution sale a slip was added to the proclamation of sale that the interests of the son of the judgment-debtor were not sold but by mistake the sale certificate stated that the purchaser had purchased the entire property including the sons' interests:

Held: that the shares of the sons were not effected by the sale. [P 114 C 2]

V. C. Kelkar—for Appellants.

P. B. Shingne—for Respondent.

Macleod, C. J.—In this case the Court passed an order that the sale with regard to the mortgaged property should proceed in respect of eight-annas share of defendant 1. That was the share of Govind, the father of the present plaintiffs. Apparently no one knew of the existence of the plaintiffs at that time. They were not made parties to the proceedings. Under that order the property was put up for sale by auction. As nobody bid over Rs. 1,000, the present defendant bought the eight-annas share for Rs. 1,005. The defendant then filed a suit for partition against the holder of the other eight-annas share and got a decree in 1911. The plaintiffs, who are the sons of Govind, then came forward and said that they were not parties to the decree and darkhast, and that the Court sale only affected their father's share which was two annas, and that therefore their share of six annas remained unaffected.

We have to consider then what was sold by the Court under the order made on 22nd October 1908. No doubt the Court directed that the eight annas share of defendant 1 in that suit should be sold. Then the proclamation of sale was drawn up in accordance with the High Court Circulars. At p. 97, R. 69 (7) lays down in what form the proclamation of sale should be prepared. That states:

"If in the case of a Hindu judgment-debtor it is desired to sell the interest of any other member of the family (e. g., that of a minor

son or brother), the name of such member and the fact that his interest is being sold must be stated in the proclamation as otherwise his interest will not pass to the purchaser."

A slip was added to the proclamation of the sale that the interests of the sons of the judgment-debtor were not sold. If it had not been for that slip no doubt under the ruling of the Privy Council in *Shripat Singh v. Maharaja Sir Prodyat Kumar Tagore* (1) the sale of the right, title and interest of Govind would have included other interests which the judgment-debtor himself might have sold. But when it is expressly stated in the proclamation that the interests of the sons are not sold and it turns out afterwards that there are sons then it is impossible to see how it can be argued that the auction-purchaser had purchased the interests of the sons. It makes no difference if by some mistake a certificate is given to him that he has purchased the eight-annas share of Govind. In this case the defendant himself was the purchaser and it was his business to look at the proclamation of sale and see exactly what was being sold. We have been asked to look at other facts in the case, namely, the order of the Court and the certificate. But however much we look at those other facts, we still have this plain fact that the interests of the sons were not sold. If they were not sold, they could not have been bought. It may be that all the equities in the case may be with the defendant. But he has only himself to blame, if he has been so careless at the time of the auction as not to see exactly what was being put up for sale. The learned Judge seems to think that it was not the business of the defendant to exercise any such precautions and that if he purchased without dreaming that the karkun would add such a slip, as was added, against the orders of the Court, still he must be taken as having bought what as a matter of fact, was not put up for sale. It is necessary in Court sales that everything should proceed according to order, and once we depart from the rules, and find, as we are asked to do in this case, that a man has bought what was not put up for sale there is no knowing what arguments may be presented to us in other cases, with the result that there will be no regularity and no proper order in conduct.

(1) A. I. R. 1916 P. C. 220=44 Cal. 524=44 I. A. 1=39 I. C. 252 (P.C.).

ing these Court sales. In my opinion therefore the decree of the lower appellate Court must be set aside, and the plaintiffs must succeed. The decree of the trial Court should be restored [with costs throughout.

Heaton, J.—Many years ago it was recognized that the laxity and confusion in connexion with the Court sales of joint family property of Hindus amounted to an evil which it was necessary to correct. Joint family property was loosely and imperfectly described and it constantly maintained that the interest therein of members whose existence had been totally ignored during the progress of the suit had been sold at Court sales. It was in order to introduce some precision and care in these matters that the High Court laid down R. 69 (7) of the Manual of High Court Circulars at p. 97, which has been referred to by my Lord the Chief Justice. This rule called general attention to the circumstances that if in the case of a Hindu judgment-debtor it was desired to sell the interest of other members of the family the names of those members should be stated. We have here a typical case. A mortgagee brought a suit and obtained a decree, and under that decree the eight-annas share of defendant 1 in the suit was ordered to be sold and property described as his eight-annas share in the proclamation was sold. As a matter of fact he had three sons. But during the progress of the suit no mention was made of them, and the property was described roughly in the proclamation as the eight-annas share of this defendant 1. But in the proclamation of sale there appeared, in accordance with the very careful directions that this Court had given a notice that

"no interest of any son brother or other coparcener of the said judgment-debtor shall pass unless hereinbefore by name expressly specified for sale."

What was actually announced for sale therefore was the interest of defendant 1 and the interest of other members of the family was excluded. It seems to me, after hearing this case, that it is futile now to urge that what was sold at that sale was the entire eight-annas share. To do so would be to ignore the express provision in the proclamation of sale. It would also be to effect that very evil which the careful orders of this Court

were promulgated in order to prevent. I confess I am rather astonished to find the Court of first appeal apparently taking the view that the karkun who passed on the proclamation this condition that no interest of any son, brother, etc., should pass had done so against the order of the Court. There is nothing on the record so far as I can see, to justify such a statement. On the other hand there are express and definite rules of this Court and it may be presumed, and I think safely presumed that this condition was introduced, not by the whim of the karkun or against the orders of the Court, but in order to give effect to the directions of the High Court. I think therefore the appeal must be allowed with costs throughout.

G.P./R.K. *Appeal allowed.*

A. I. R. 1920 Bombay 115 (1)

MACLEOD, C. J.

Bhujagonda Adgonda Patil—Applt.

v.

Bala Bhokare—Plaintiff—Respondent.

Second Appeal No. 648 of 1918, Decided on 11th December 1919, from decision of Sub-Judge, Satara, in Appeal No. 451 of 1916.

Hindu Law—Adoption—Adoption in face of prior adoption is invalid—Prior adoption must be first set aside.

Where there is an adopted son in existence a Hindu widow has no right, under the Hindu law, to adopt a son; her right to adopt would arise only on the previous adoption being set aside. [P 115 C 2]

K. N. Koyajee—for Appellant.

Y. N. Nadkarni—for Respondent.

Judgment.—The plaintiff sued to recover possession of the property mentioned in the plaint, on the ground that he was adopted by the widow of one Adgonda who died in 1911. Defendant 1 was adopted by Adgonda himself. Defendant 2, the elder brother of Adgonda, is sued on the ground that he was colluding with defendant 1 and had also held possession of the suit property wrongfully. The plaintiff's case depended absolutely on the question whether he could prove his title as the adopted son to Adgonda, and he contested defendant 1's claim to be the adopted son of Adgonda on the ground that the adoption was invalid, the adopted son being the son of Sonubai, the sister of Adgonda. Both the lower Courts have considered the question of the invalidity of

defendant 1's adoption at great length. But the real point in the case, curiously enough, has not been noticed by either of the lower Courts or by the parties, although one issue, namely whether the adoption of defendant 1 by Adgonda amounted to a prohibition against his widow's adopting, went somewhat near the point I am referring to. That point is, Adgonda having died leaving a son although he was a son by adoption, the widow's right to adopt remained suspended as long as that son was in existence. If there had been a natural son, her right to adopt would not arise until the death of that son without issue, and without leaving a widow. As the son was an adopted son, the widow's right to adopt to her husband would also not arise until that adoption was set aside. It is not sufficient for her to say:

"In my opinion my husband's adoption is invalid, and therefore I am entitled to ignore it and adopt a son to my husband."

It was not for her to judge whether the adoption by her husband was valid or invalid. In other words, as long as there is a son in existence, it must be presumed that he is the son of the husband. The plaintiff therefore in this case is out of Court on his plaint, as it is not open to him to challenge the adoption of defendant 1. He has got to show first that he is the adopted son properly adopted to Adgonda, and he fails in doing that, because there was an adopted son in existence at the time of his own adoption. This point arose some time ago in a suit which I tried on the original side. I do not know whether it has been reported. But no authority has been cited for the proposition that a widow can adopt to her husband when there is in existence a son adopted by her husband. The appeal therefore must succeed and the plaintiff's suit must be dismissed with costs throughout. Same order in joint Second Appeal No. 418 of 1918.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 115 (2)

MACLEOD, C. J. AND HEATON, J.

Jagannath Kashiram Tamboli—Appellant.

v.

Shankar Ganpat Shimpi—Respondent.

Letters Patent Appeal No. 29 of 1915, Decided on 30th July 1919, from decision of Batchelor, J., in S. A. No. 971 of 1913.

Evidence Act (1 of 1872), S. 92 (4)—Oral agreement to accept less in full satisfaction of mortgage debt is inadmissible.

Under Prov. (4), S. 92 oral evidence is inadmissible to prove an agreement whereby a mortgagee agrees to accept less than the amount due to him under a registered mortgage in full discharge of the mortgage. [P 116 C 1]

A. G. Sathaye—for Appellant.

G. S. Rao and *D. G. Dalvi*—for Respondent.

Macleod, C. J.—This is an appeal under the Letters Patent from the decision of Batchelor, J. The trial Court had admitted evidence led by the defendant to show that the two mortgages in the suit were discharged by the mortgagees by a payment of Rs. 800. It was argued in appeal that this evidence was inadmissible, on the ground that it rescinded or modified the contract required to be in writing which had been registered according to law. The learned appellate Judge has held that the evidence called and received was directed to a totally different purpose, namely, the purpose of showing that these contracts of mortgage had been terminated by the discharge of the obligation imposed by them, and he saw nothing in S. 92 prohibiting the admission of such evidence. We have been referred to the recent case of *Karampalli Kuni Kurup v. Thekku Vittal Muthorakutti* (1) which seems to be exactly on all fours with the present case. The head-note runs :

"A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and, if it has to be proved, oral evidence is inadmissible under S. 92, Prov. 4, Evidence Act."

But the argument before us has been that there has not been a subsequent oral agreement to rescind or modify the mortgage, but there has been an actual discharge, and that oral evidence was admissible to prove a discharge. In my opinion there is no substance in that argument. The defendant's case must be that the mortgagee agreed to receive Rs. 800 in full satisfaction of the much greater amount which was due on the mortgage, and although he might have said when receiving Rs. 800: "I now discharge you from the mortgage," there was nonetheless an agreement which modified the original agreement of mortgage. It would be an extremely dangerous precedent if oral evidence were allowed of such agree-

ments. In this case it may be noted that the plaintiff himself denied having received Rs. 800, or having given a discharge on the mortgage, although the payment has been proved as a fact. But one can easily imagine that there may be many cases where the mortgagor may set up a false case of such an agreement, and it appears to me that it was to meet such cases, inter alia, that Prov. 4, S. 92, Evidence Act, was enacted. In my opinion the appeal must succeed. The result will be that the defendant will be allowed credit for Rs. 800, which he has proved he has paid to the mortgagee. We allow the appeal with costs in proportion throughout, and remand the case to the lower Court to take an account in accordance with this judgment.

Heaton, J.—I agree. But as the case presents so many possibilities of argument, I would like to put my conclusion in my own way. There are three ways in which the defendant's case might have been presented. The defendant might simply have pleaded that the mortgage was discharged and nothing further. That was not what he did plead, and presumably not what he could have proved. So I come to the second way in which the defendant could make his defence, and that was the way he adopted. He said that an agreement had been entered into between the mortgagee and the mortgagor according to which on the payment of Rs. 800, which, was only a part of the mortgage debt, the mortgagee would give a complete discharge and the mortgage deed would cease to operate. It is found as a fact that Rs. 800 were paid. But this payment was a payment of part only of the mortgage debt, so the mortgage deed would still be operative; it would still regulate the relations between the mortgagor and the mortgagee, unless there had been some modification of its terms. The modification suggested is that the mortgage debt should be changed, from what under the deed it would be, to a sum of Rs. 800. That would be a very large modification of the terms of the deed. This modification could not be proved, as is provided by Prov. 4, S. 92, Evidence Act, by the method by which the defendant sought to prove it. We cannot therefore take it that the defendant can succeed in that way. He has not shown that the mortgage debt has been discharged, because the law of evi-

(1) [1903] 26 Mad. 195.

dence prevents him from showing it. The third way in which the defendant might have presented his defence was one which has not been adopted by him, and as to which I will say nothing beyond mentioning it. He might have pleaded that the mortgagee had entered into an agreement to reconvey to him the mortgaged properties on payment of Rs. 800. Whether the defence would have availed him or not I do not know. But I do not wish my judgment to be understood as stating that a defence of that kind would necessarily be excluded by the law of evidence. I therefore agree with the proposed order.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 117

MACLEOD, C. J. AND HEATON, J.

Namdev Satvashet Shimpi—Plaintiff—Appellant.

v.

Dhondu Sadashiva Patil — Defendant—Respondent.

Second Appeal No. 1053 of 1918, Decided on 27th January 1920, from decision of First Class Sub-Judge, Nasik, in Appeal No. 164 of 1917.

(a) Registration Act (16 of 1908), S. 17 — Registered sale deed with unregistered agreement of reconveyance—Vendor continuing in possession under rent note— Agreement to reconvey being unregistered held not admissible—Evidence Act (1 of 1872), S. 91.

Defendant sold certain property to plaintiff. At the same time the latter executed an unregistered agreement to reconvey the property to the defendant after five years. Defendant continued in possession of the property under a rent-note. In a suit by the plaintiff to recover possession of the property:

Held: that under the circumstances, it could not be said that there had been misrepresentation by the plaintiff; (2) that the agreement to reconvey, being unregistered, could not be admitted in evidence. [P 118 O 2]

(b) Deed—Construction—Mortgage or sale—Whether sale deed and deed of reconveyance form mortgage, actual words must be considered—Other circumstances also can be considered.

Where the question is whether a sale deed and an agreement to reconvey make together a mortgage by conditional sale, the Court must look to the actual contents of the documents and construe them accordingly. But it may be that there is such extrinsic evidence and circumstances which show the relation of the written language to existing facts and the Court might be able to come to the conclusion that the documents which on the face of them constitute a sale, and an agreement to reconvey within a certain period or after a certain period, amount to a mortgage. [P 118 O 1]

A. G. Sathaye for *P. B. Shing ne*— for Appellant.

S. R. Bakhale—for Respondent.

Macleod, C. J.—The plaintiff sued to recover possession of the plaint lands and house, together with the crops standing on the lands, and Rs. 120 for damages for the loss of rent of the lands, and Rs. 18 for damages for loss of the house rent for three years before suit, and future profits. He based his suit on rent-notes. The defendant contended that he and his brother unwillingly passed the sale deed of the plaint property to the plaintiff's father; that the property was worth Rs. 2,400 or Rs. 2,500, and the sale deed was got instead of a mortgage deed so that the debt might be soon satisfied; that they passed the deed as persons in need and because the plaintiff's father represented to them that he would not claim ownership over the property; that the plaintiff's father had given them an agreement in writing to reconvey the property to them on satisfaction of the debt so that the defendants might have confidence after passing the sale deed.

The plaintiff purchased the property in 1895. At the same time he passed an agreement to reconvey the property after five years. This document was not registered. Thereafter plaintiff leased the land to the vendor. The trial Judge held that S. 10-A, Dekkhan Agriculturists' Relief Act would not apply, and that the agreement to reconvey could not be looked into for want of registration. Therefore he passed a decree in favour of the plaintiff. This decree was reversed on appeal, the learned appellate Judge coming to the conclusion that there had been misrepresentation, that the defendant and his brother would never have passed the sale deed if the plaintiff's father had not assured them that their ownership was not lost and that they would be allowed to redeem. I think really the learned Judge did not mean that there was misrepresentation at the time the transaction took place, but that the representation made at the time had not been adhered to thereafter by the plaintiff, and that in reality the plaintiff's suit was in fraud of the representation made by him in 1895. However that may be, the argument that the transaction must be considered a mortgage, because there had been a misrepresentation,

sentation at the time the document was signed, cannot be upheld.

The real question is whether the sale deed and the agreement to reconvey make together a mortgage by conditional sale. Strictly speaking, the Court has to look to the actual contents of the documents, and construe them accordingly. But it may be that there is such extrinsic evidence and circumstances which show the relation of the written language to existing facts that therefore it would be possible to come to the conclusion that the documents which on the face of them constitute a sale, and an agreement to reconvey within a certain period, or after a certain period, amount to a mortgage. But the case was not treated in either of the Courts below on that footing. It was never suggested anywhere, as far as I can see, that these two documents constituted a mortgage by conditional sale. The defendant's case appears really to have been one for specific performance of an agreement to reconvey, and that defence could not succeed for many reasons. Therefore as it has never been suggested in the lower Courts that there was a mortgage by conditional sale, it would be very difficult for this Court to come to that conclusion on the evidence before it. There might be cases in which extrinsic evidence and circumstances would be so strong that we could come to the conclusion that the parties intended to effect a mortgage by conditional sale. But we do not see such extrinsic evidence in this case. Certainly not of such a strong character that we could possibly upset the decision of the trial Court. We therefore think that the appeal must be allowed, and the decree of the trial Court restored, the appellant being entitled to his cost throughout.

Heaton, J.—I agree. I think the only way in which a conclusion in favour of the defendant could be arrived at would be by holding that the transaction of 1895 was a mortgage by conditional sale. But that is not the case made out, or dealt with in either of the Courts below, and it would be irregular for us to re-estimate the evidence and on our own account arrive at a conclusion that a mortgage by conditional sale was actually entered into. We cannot I think do that in this case. The reasoning of the lower appellate Court seems to me to be faulty, mainly because the Judge

has used the word "misrepresentation," when apparently he meant representation. Consequently his argument is fallacious, for the conclusions which follow from a case of misrepresentation are not those which follow from a case of representation. Here undoubtedly, on the facts as stated by the lower appellate Court, there was not a misrepresentation. There was a representation that the land would be resold after five years, and that representation was in writing. That writing however was not registered; so it cannot form a part of the disposition of the property. We must restore the decree of the first Court with costs throughout.

G.P./R.K.

Decree reversed.

A. I. R. 1920 Bombay 118

MACLEOD, C. J. AND HEATON, J.

Supdu Dhodu Gujar—Plaintiff—Appellant.

v.

Madhavrao Jivram Gujar—Defendant—Respondent.

Second Appeal No. 870 of 1918. Decided on 28th November 1919, from decision of Asst. Judge, Khandesh, in Appeal No. 189 of 1918.

Decree—Construction — Consent decree—Compromise stipulating payment of certain sum within one month—Delivery of property within four months if payment made—Delay of one month in payment—Mortgagee held entitled to interest but could not enforce stipulation to retain property.

A consent decree passed in September 1917 in a mortgage suit provided that the plaintiff mortgagor must pay into Court a certain sum within a month, and on his doing so, the defendant must deliver possession of the property in February 1918, but if such payment is not made, the defendant would be entitled to retain possession as owner. The plaintiff made default and did not make the payment till November 1917, and the defendant claimed to be entitled to retain the property as owner:

Held: that as possession was not to be delivered to the plaintiff till February 1918, that being the important date considered by the parties when arranging the compromise, and payment having been made three months before that date, it was open to the Court to relieve against the consequences of the default of the plaintiff on proper terms, and that the plaintiff was entitled to recover possession on paying interest at 6 per cent. for one month from the date of the decree." [P 119 C 2]

P. B. Shingne—for Appellant.

B. G. Rao—for Respondent.

Macleod, C. J.—In this case the plaintiff sued for a declaration that what appeared to be a sale deed of the plaintiff property was merely a mortgage deed,

and that he was entitled to redeem the property. The parties arrived at an amicable settlement and in accordance with a compromise application filed by them a consent decree was recorded. The terms are set out at p. 1 of the print. It will be seen that with regard to one survey number the plaintiff had to pay Rs. 1,100 to the defendant within one month from the date of the consent decree. If the above amount was not paid, the defendant was entitled to retain possession of the suit number as owner. In any event he was entitled to remain in possession until the February following for the purpose of removing the crop he had sown. The plaintiff made default and the defendant, claimed that he was entitled to retain the property under the terms of the decree. The plaintiff paid in Rs. 1,500 for both the properties on 26th November 1917, and then presented an application for a declaration that the time stated in the compromise application was not of the essence of the contract. The trial Court allowed the application. An appeal against that order was successful, the learned Assistant Judge holding that the parties had come to a solemn agreement upon which they based their rights and liabilities. It was held in *Lachiram v. Jana Yesu* (1), where there had been a consent decree which provided for the payment of a certain sum found due by fixed instalments, and it was provided that on failure to pay two instalments the plaintiff was entitled to recover possession of certain lands, the plaintiff was entitled to take possession of the property after there had been a default and the Court had no power to vary the consent decree. The Full Bench case of *Krishnabai v. Hari Govind* (2) was referred to in the judgment, and it was held that that case was inapplicable where the relation of landlord and tenant was not created by the decree. In *Krishnabai v. Hari Govind* (2) there was a consent decree which established the relation between the parties of landlord and tenant.

The plaintiff then filed a suit claiming that by his action the defendant had forfeited his rights created by that consent decree, and the Full Bench considered that the consent decree constituted an agreement between the parties and

was to be dealt with as if there had been an original agreement between the parties out of Court, and as under such an agreement made out of Court the Court would relieve against forfeiture, so the Court would relieve against forfeiture under the contract created by the consent decree. Therefore in each case the terms of the consent decree must be considered. The Court cannot lay down a general principle that in no case can the terms of a consent decree be varied. Now the consent decree in this case amounted to a decree for redemption. The plaintiff-mortgagor had to pay into Court a certain sum within a month, and if he did not do so certain consequences arose. In every decree for redemption where a period for payment is described, it will follow that if default is made the mortgagee has certain rights. He can apply for foreclosure or for sale. But until he has foreclosed or sold the property, the Court of equity will always be disposed to grant relief to the defaulting mortgagor. In this case, although the plaintiff might have paid the amount decreed within the month allowed, he would not have got possession until the February following, and that evidently was the important date considered by the Court and by the parties when they arranged the compromise. It is true that under the consent decree the defendant for a certain period would have the advantage of his money and also would have the advantage of possession. But we think it would be open to the Court to relieve against a default of the plaintiff on proper terms. As a matter of fact the plaintiff paid in the money by the 26th November, still three months before he would get possession under the consent decree. We think therefore that he is entitled to recover possession of the property on paying interest for a month from the date of the decree until 26th November 1917 at 6 per cent. The appeal therefore will be allowed with costs in this and the lower appellate Court.

Heaton, J.—When once it is conceded that we have here, though it takes the form of a decree, what is substantially a contract, then I think the principle, on which the decision in *Krishnabai v. Hari Govind* (2) was founded, applies. Then whether we apply the rule as to time being of the essence of the

(1) A. I. R. 1914 Bom. 127=27 I. C. 890.

(2) [1907] 81 Bom. 15 (F. B.).

contract, or the general principle that where you have relations of mortgagor and mortgagee, although the time may be fixed for the payment of the mortgage debt by the contract, the mortgagor would still be entitled to pay the mortgage debt until the relation of mortgagor and mortgagee had ceased to exist, the result is the same. The contract we are concerned with is of course peculiar. It is in some ways like an agreement to purchase property on the part of one person and an agreement to sell on the part of another. It is in some ways like a mortgage where the provision is that the mortgage debt shall be paid on a particular date, and that on a later date the mortgaged property should be restored to the mortgagor. But although it is peculiar in its terms, it seems to me the contract is one to which the principles governing contracts for the sale and purchase of immovable property, or contracts of mortgage might well be applied, and ought to be applied. If they are applied, then it follows, as it seems to me with no room for hesitation whatever that although a date was fixed for the payment, the payment that was made in this case will be allowed to operate as a proper payment under the decree, though it was made some two months later than the time fixed. I agree therefore that the appeal should be allowed with costs in this Court and the lower appellate Court.

G.P./R.K.

*Appeal allowed.***A. I. R. 1920 Bombay 120**

MACLEOD, C. J. AND HEATON, J.

Shankarsana—Defendant—Appellant.

v.

Shivabhai Vallabhbai—Plaintiff—Respondent.

Second Appeal No. 399 of 1918, Decided on 14th November 1919, from decision of Dist. Judge, Ahmedabad, in Appeal No. 363 of 1916.

Bombay Court of Wards Act (1 of 1905), Ss. 13 and 14—Besides publishing notices as provided in Ss. 13 and 14 some other method should be prescribed for benefit of illiterate persons.

Although the publication of notices under Ss. 13 and 14 in the Government Gazette and local newspapers in English and in vernacular is a sufficient compliance with the law, yet in the interests of illiterate persons some special method of publishing notices calling for claims should be prescribed. [P 120 C 2]

*G. N. Thakor—for Appellant.**N. K. Mehta—for Respondent.*

Macleod, C. J.—The plaintiff brought this suit by his next friend, the Talukdari Settlement Officer, against the defendant to recover possession of the plaint land with mesne profits for the year 1915, alleging that his estate was in charge of the Court of Wards; that a notice calling for submission of claims was published in the Government Gazette of 6th June 1907, that the defendant did not submit his claim as a mortgagee within six months as required by the said notice, that therefore notice was issued to the defendant to give up possession of the land on 25th October 1913 under the Bombay Land Revenue Code, that possession was taken of the land on 3rd June 1914 in the presence of the Panch, that defendant took back such possession wrongfully on or about 6th June 1914, when the cause of action for this suit accrued. The defendant denied the claim and alleged that the notice did not bind him, that S. 14, Court of Wards Act, did not bind him, nor did it entitle the plaintiff to maintain the present suit against him, a mortgagee in possession. The trial Court dismissed the suit. The plaintiff appealed and his claim was decreed with costs throughout. It is admitted that a notification under S. 14 (1) was properly published and also the notice under S. 13 (1) to file claims was properly published. The only defence the defendant has is that he is an illiterate cultivator and could not read the Government Gazette. The learned District Judge admitted that it was a hard case. He says:

"It is absurd to suppose that an illiterate cultivator will read the Government Gazette. It is however just as absurd to suppose that he will read the 'Praja Bandhu' or 'Gujarati.' No doubt where there are numerous creditors the fact that an application is necessary soon gets about, but it is not always the case that there are numerous creditors. It would be much more satisfactory, if there were public notification by beat of drum in the principal village of the estate and at the taluka town. To give notice to each creditor as suggested by the lower Court is impracticable, as the object of the statute is to enable the Court of Wards to ascertain who the creditors are."

I agree with the remarks made by the learned District Judge. It is certainly desirable that there should be some further publication of the notice calling for claims than the mere publication in the Government Gazette. Under S. 14 (1) the notice would be published in the Government Gazette and in such other

manner as the Governor in Council may, by general or special order, direct, and I think our best course is to send a copy of the proceedings in this case and our judgment to Government, suggesting that some special order should be made under S. 14 (1), Court of Wards Act, with regard to the further publication of notices calling for claims under that section. At present this appeal must be dismissed with costs.

Heaton, J.—I agree.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 121

HEATON, J.

On difference between

SHAH AND CRUMP, JJ.

Hargovind Pulchand Doshi—Plaintiff
—Appellant.

v.

Bai Hirbai—Defendant—Respondent.

First Appeal No. 241 of 1918, Decided on 21st February 1920, from decision of First Class Sub-Judge, Ahmedabad, in Suit No. 205 of 1917.

(a) Bombay Court of Wards Act (1 of 1905), Ss. 31 and 32—Ss. 31 and 32 do not apply to Gujarat talukdars whose estate is managed by settlement officer.

Sections 31 and 32 are not applicable to a suit against a Gujarat talukdar whose estate is under management by the Talukdari Settlement Officer who has been constituted a Court of Wards. [P 122 C 1; P 127 C 1]

(b) Interpretation of Statutes—Intention obscure—It should be presumed that ordinary law is not departed from.

Where the legislature has made its intention obscure, a Judge is bound to infer that there is no departure from the ordinary law intended, unless expediency or some other consideration compels an inference that it is intended.

[P 127 C 1]

B. G. Rao—for Appellant.

N. K. Mehta—for Respondent.

Shah, J.—The plaintiff in this case sued to recover Rs. 6,800 on a bond dated 15th March 1914 for Rs. 5,000 with interest from the defendant, who is a talukdar.

The defendant admitted the execution of the bond and contended on the merits that she was an agriculturist and that an account as required by the Dekkhan Agriculturists' Relief Act should be taken. She also pleaded that her estate was taken under management by the Talukdari Settlement Officer, that the said officer was constituted a Court of Wards, that he ought to have been joined as a guardian of the defendant as required by

S. 32, Bombay Court of Wards Act, and that as no notice was given to that officer as required by S. 31 of the said Act, the suit was bad.

The suit was filed on 14th March 1917, just within three years from the date of the bond.

The trial Court found on the merits that Rs. 6,800 were due to the plaintiff, but dismissed the suit on the ground that the absence of the notice required by S. 31 and the nonjoinder of the Talukdari Settlement Officer as a guardian ad litem of the talukdar, as provided by S. 32, Court of Wards Act, was fatal to the suit.

The plaintiff has appealed to this Court; and it is contended on his behalf that Ss. 31 and 32, Court of Wards Act, cannot apply to the present suit and that his claim should have been decreed by the lower Court. The respondent contends that Ss. 31 and 32, Court of Wards Act, apply and that the noncompliance with the provisions of these sections is fatal to the plaintiff's claim. We have so far heard arguments only on this question of law.

The few facts relevant to this point are not in dispute. The defendant is a talukdar within the meaning of the Gujarat Talukdars Act. The Talukdari Settlement Officer has been constituted a Court of Wards for the whole area, to which the Gujarat Talukdars Act is applicable, by a notification dated 21st July 1908, published in the Bombay Government Gazette, Part 1, at p. 1474, under S. 3 (c), Court of Wards Act. In 1914 the management of the defendant's estate was undertaken by the Talukdari Settlement Officer under S. 28. That officer published a notification under S. 29-B, Gujarat Talukdars Act, inviting the claims against the talukdar under that section and signed it as Talukdari Settlement Officer and Court of Wards. The claim was duly submitted to that officer within the time prescribed by the section and ultimately the plaintiff filed the present suit against the defendant.

It is claimed for the defendant that in virtue of the provisions of S. 29-G, Gujarat Talukdars Act, the provisions of Ss. 31 and 32, Bombay Court of Wards Act, apply to the present suit; on the other hand, it is contended that under that section the provisions of the Bombay Court of Wards Act would apply without

prejudice to, and so far as they were not inconsistent with, the provisions of the Act referred to in the section. Thus the question is whether Ss. 31 and 32, Court of Wards Act, can be applied without prejudice to and consistently with the provisions of Bombay Act 2 of 1905 (which may be taken to be the Act indicated by the expression "this Act" in S. 29-G). The effect of the application of these sections is a question of secondary importance in this case. For even if the non-compliance with the provisions of S. 32, Court of Wards Act, may not be fatal to the suit, as pointed out in *Amin Saheb v. Sheikh Masleudin* (1), it is clear that the absence of a notice required by S. 31 of that Act, if the section applies, would be fatal to the suit. I may here dispose of the contention raised on behalf of the appellant that this is not a suit relating to the property of the ward within the meaning of S. 31. I do not think the contention is sound. I am of the opinion that a suit on a promissory note or a bond against a ward would be a suit relating to the property of the ward within the meaning of S. 31.

The really important question therefore is whether the provisions of Ss. 31 and 32, can apply to a suit by a creditor against a talukdar whose estate is under the management of the Talukdari Settlement Officer, so long as the said notification of 1908 under S. 3 (c), Court of Wards Act, is in force. It is a question of practical importance so far as suits against the Gujarat Talukdars are concerned.

Section 29-G, Gujarat Talukdars Act, provides that on the issue of a notification under S. 3 (c), Bombay Court of Wards Act, constituting the Talukdari Settlement Officer a Court of Wards, the provisions of the Bombay Court of Wards Act, 1905, shall without prejudice to, and save so far as they may be inconsistent with, anything contained in this Act, be deemed to apply to or in respect of any estate, which may thereafter be taken under the management of the Talukdari Settlement Officer under S. 26 or S. 28, as if it were an estate under his superintendence as such Court of Wards and the talukdar, whose estate is taken under management is a Government ward within the meaning of that Act. It is in virtue of these provisions that Ss. 31 and

32 are said to apply to the estate and the talukdar in question. The conditions as to the publication of the notification and the management of the Talukdari Settlement Officer referred to in the section are satisfied. The question therefore is whether the application of Ss. 31 and 32 involves any prejudice to the provisions of the Act referred to in S. 29-G as "this Act" and whether the sections are inconsistent in any way with that Act.

In order to determine the question of prejudice or inconsistency, it is necessary to examine briefly the scheme and history of the relevant Acts. In 1862 an Act was passed with a view to deal with the indebtedness of talukdars in the District of Ahmedabad. It contained a special scheme. I do not consider it necessary to examine it in detail. It is enough to point out that the civil Courts were practically debarred from entertaining suits to recover debts against a talukdar, in respect of whose estate a declaration was made by the Government under S. 1 of the Act. The Gujarat Talukdars Act, with which we are concerned, was passed in 1888. The last section of that Act practically limited the application of the Act of 1862. The purpose of the Gujarat Talukdars Act, as stated in the preamble, was to provide for the revenue administration and the partition of the estates held by a certain class of landholders in some of the Districts of Gujarat. Its scheme, as disclosed in the provisions of the Act was essentially to give effect to the said purpose: and it is sufficient to say that, generally speaking, the scheme was quite different from that of the Bombay Court of Wards Act, 1905, to which I shall refer presently. It is relevant to point out that Ss. 26 to 28, as they stood before the amending Act 5 of 1905, enabled the Talukdari Settlement Officer to take up the management under certain conditions which in no sense indicated any kind of disability on the part of the talukdar concerned to sue or to be sued in a civil Court. The property remained vested in the talukdar and the Talukdari Settlement Officer was merely the manager of the estate. Up to 1905 that undoubtedly was the rule applicable to the talukdars, except in those cases where the estates were managed under Bombay Act 6 of 1862. They were liable to be sued and competent to sue even when their estates were under the man-

(1) [1916] 40 Bom. 541=37 I. O. 186.

agement of the Talukdari Settlement Officer under Ss. 26 to 28.

In 1905 the Bombay Court of Wards Act was passed, and the provisions of Ss. 4 and 5 of the Act show that it was meant for landholders who were disqualified to manage their own property and the disqualifications are indicated in S. 5. Its scheme, generally speaking, was different from that of the Gujarat Talukdars Act. It created a statutory disability for such disqualified landholders to sue or to be sued, subject to the provisions of S. 32. About the same time the Gujarat Talukdars Act was amended by Bombay Act 2 of 1905; and the amendment with which we are concerned was that the main Act was supplemented by certain provisions on the lines of the corresponding provisions of the Court of Wards Act, enabling the Talukdari Settlement Officer to invite and to adjudicate the claims against the talukdari estates concerned without any prejudice to the right of the creditors to sue the talukdars. S. 28 was amended; but the amendment does not affect the present point.

Sections 29-A to 29-G, with which we are concerned, were incorporated in the main Act. They are on the lines of the corresponding provisions in the Court of Wards Act. S. 29-G was enacted with a view to provide generally by reference that the provisions of the Bombay Court of Wards Act may apply under certain circumstances so far as they may be applicable without prejudice to and consistently with Act 2 of 1905. Thus in 1905 the legislature did not make any provision in terms against the competence of the talukdars whose estates were taken under management under S. 25 or S. 28 to sue or to be sued in the ordinary way.

For convenience the legislature provided in S. 29-G for the application of the provisions of the Bombay Court of Wards Act, so far as they can apply without prejudice to the main Act as amended in 1905, by a general reference to the Bombay Court of Wards Act under certain conditions. This method of legislation has its own inconveniences, for as occasion arises the Courts have to determine whether the particular provisions in the Court of Wards Act could be applied without prejudice to or consistently with the amending Act, and in doing so the Courts have not that assis-

tance in determining the intention of the legislature, which they would have when the provisions are directly incorporated in the main Act. Under these circumstances it is difficult to determine the intention of the legislature with reference to the particular provisions. Just as the words in S. 29-G making applicable the provisions of the Court of Wards Act are general, it must be remembered that the saving clause also is very wide in its terms. We ought to construe these words in their plain and natural sense and determine whether in applying Ss. 31 and 32, Bombay Court of Wards Act, any prejudice to or inconsistency with Act 2 of 1905 is involved. In my opinion, in the absence of any clear indication, the question of prejudice or inconsistency should be considered in the light of the general scheme and history of the Gujarat Talukdars Act and the provisions contained in Ss. 29-A to 29-E. S. 29-D specifically provides that, subject to certain provisions, which are not material for the present purpose, nothing in the section shall be construed to bar the institution of a suit in a civil Court for the recovery of a claim against a talukdar whose estate is taken under the management or his property, which has been duly submitted to the managing officer. This does not confer any right to sue, but it expressly saves the right of suit against a talukdar whose estate is taken under management without any limitation. This provision is inserted in an Act, which neither creates nor implies any disability in the talukdar to sue or to be sued in the ordinary way. Under the circumstances it is clear to my mind that, while amending the Gujarat Talukdars Act in 1905, the legislature did not create or imply any such disability apart from the provisions of S. 29-G.

Having regard to the general terms of the saving clause in that section, it seems to me that the application of Ss. 31 and 32, Bombay Court of Wards Act does involve a prejudice to the provisions of the amending Act, particularly to sub-S. (3), S. 29-D. These two sections are appropriate in the Bombay Court of Wards Act. In my opinion they are not essential and at any rate not equally appropriate in the Gujarat Talukdars Act; and I am not satisfied that the legislature intended to effect

such an important procedural change without expressly providing for it in the main Act, as is involved in the application of Ss. 31 and 32 to suits against Gujarat talukdars whose estates are taken under management under S. 26 or S. 28. The fact that claims were invited in the present case under S. 29-B, and not under the corresponding provision of the Court of Wards Act, indicates that the procedure under the Gujarat Talukdars Act was intended to be followed. Apart from this consideration however I am of opinion that the application of Ss. 31 and 32, Bombay Court of Wards Act, involves a prejudice to the provisions of the Gujarat Talukdars (Amendment) Act, 1905, even if they are not inconsistent with S. 29-D, sub-S. (3). There are many provisions in the Court of Wards Act which can apply to talukdars and their estates under S. 29-G without any prejudice to the Gujarat Talukdars Act. But Ss. 31 and 32 do not seem to me to fall in that category.

I am therefore of opinion that the suit was properly brought against the talukdar and is not bad for want of notice required by S. 31, Bombay Court of Wards Act.

I would therefore hear the appeal on the other issues and pass a decree in favour of the plaintiff for the amount which may be found due on the bond sued upon.

Crump, J.—The only question for our decision is whether Ss. 31 and 32, Bombay Court of Wards Act (Bombay Act 1 of 1905) are applicable to this suit, and if so, whether the suit is barred by those provisions.

The facts, so far as they are necessary for the determination of this question, are as follows: The defendant is a talukdar and as such within the scope of the Gujarat Talukdars Act (Bombay Act 6 of 1888). In 1908 by a notification of the Local Government under Cl. (c) of the proviso to S. 3, Bombay Court of Wards Act the Talukdari Settlement Officer was appointed to be a Court of Wards for the area to which the Gujarat Talukdars Act extends. In 1914 the Talukdari Settlement Officer took charge of the defendant's estate with the sanction of the Local Government under S. 28 of that Act. The present suit was filed on 24th March 1917.

The question for decision arises thus: it is argued that upon these facts S. 29-G, Gujarat Talukdars Act comes into operation, and that the result is that Ss. 31 and 32, Bombay Court of Wards Act apply, and as admittedly the provisions of those sections have not been complied with, the suit is barred. That S. 29-G, Gujarat Talukdars Act does apply cannot be contested. The facts here are precisely those contemplated in that section. The question is what is its effect. The operative words are as follows:

"The provisions of the said Bombay Court of Wards Act shall, *without prejudice to, and save so far as they may be inconsistent with anything contained in this Act*, be deemed to apply to, or in respect of, any estate which may be taken under the management of the said Talukdari Settlement Officer as if it were an estate under his superintendence as such Court of Wards, and the Talukdar whose estate is taken under management of a Government ward within the meaning of that Act."

The only words which can be invoked as limiting the applicability of the Bombay Court of Wards Act are the words underlined (here italicized) above. And the question is whether those words preclude the applicability of the Court of Wards Act to the present case. The proposition urged before us was that Ss. 31 and 32, Bombay Court of Wards Act were inconsistent with and not without prejudice to S. 29-D (3), Gujarat Talukdars Act. The argument was that S. 29-D (3) gave an unrestricted right to sue and that that right could not be fettered in any way without inconsistency or prejudice.

The proposition does not (in my opinion) bear examination. It rests on a mistaken view of the true meaning of S. 29-D, Gujarat Talukdars Act. The right of suit exists absolutely. It is not given by anything enacted in the Gujarat Talukdars Act. That Act may limit that right but does not confer it. The true meaning and effect of Cl. 3, S. 29-D, is not to confer any right, but to remove the bar which might otherwise be held to be imposed by the preceding clauses of the section. Those clauses would otherwise be capable of the construction that the legislature having indicated the forum and the remedy, recourse to the civil Courts is barred. The right of suit is left unfettered so far as this section is concerned save in the case of claims settled by consent. [It may be noted here that the present claim was duly

submitted within the meaning of Cl. (3).] Now Ss. 31 and 32, Court of Wards Act impose two limitations upon the right of suit. The first is that notice shall be given to the Court of Wards (S. 31), the second that the Court of Wards shall be named as guardian ad litem of the Government Ward. The legislature says to the creditor in S. 29-D, Gujarat Talukdars' Act :

"Nothing in this section shall bar your right to sue the Talukdar,"

and in the Court of Wards Act :

"You shall not sue the Talukdar without giving notice and without naming the Talukdari Settlement Officer of the Court of Wards as the guardian ad litem of the Talukdar."

Had the legislature in the former enactment said : "Nothing shall bar your right" the case would be different. As the enactments stand I see no inconsistency between these two directions, nor (in my opinion) does the second operate to the prejudice of the first. The result is that Ss. 31 and 32, Bombay Court of Wards Act must be held to be applicable.

The second question is what is the effect of these sections. The point has been discussed by this Court in *Amin Saheb v. Sheikh Masleudin* (1), and it has there been pointed out that the omission to comply with S. 32 does not necessarily entail the dismissal of the suit. Therefore S. 31 alone need be considered. It is imperative in its terms—as imperative as S. 80, Civil P. C. from which it is derived. It was argued that a suit such as the present is not "a suit relating to the person or property of a Government ward," and the case last cited is relied upon. But so far as this point is concerned, the ratio decidendi there was that the suit related to the property of an institution of which the Government Ward was a trustee. That is not so here. This suit is a suit to recover money alleged to be due on a bond executed by the Talukdar. That is in my opinion, a suit relating to the property of the Talukdar. It follows that the suit is bad for want of notice. I would therefore confirm the decree of the lower Court and dismiss the appeal with costs.

Shah and Crump, JJ.—In view of the difference of opinion on the point arising in this appeal, we state the following question of law for determination under the proviso to sub-S. 2, S. 98, Civil P. C.

Whether Ss. 31 and 32, Bombay Court

of Wards Act are applicable to the present suit.

Heaton, J.—The judgments of Shah and Crump, JJ., state the facts with such fullness and clearness that I need not repeat them.

The point for decision is whether Ss. 31 and 32, Bombay Court of Wards Act are applicable to this suit. I find that they are not.

By the Gujarat Talukdars Act and Court of Wards Act the right to sue a Talukdar in the one case and a Government Ward in the other, is left unaffected, except in certain specified cases with which we are not now concerned, though suits against the Court of Wards and officers acting thereunder are, broadly speaking, prohibited by S. 45, Court of Wards Act. The point I wish to emphasize is : that the suits which are unaffected are suits, not against Government or any officials, but against the Talukdar or the Government ward in person and by name. This is clear from the provisions of the Act in general and from S. 16, Cl. (3), Court of Wards Act and S. 29-D (3), Gujarat Talukdars Act in particular. But though this is so, the provisions of the Court of Wards Act show to my mind with unmistakable clearness that though the suit is against the Government ward by name, it is, except in form and name, a suit against the manager of the Government ward's property. This is manifest from S. 32, Court of Wards Act, which provides that the manager "shall be named as the next friend or guardian for the suit." Thereafter the suit necessarily proceeds in actual practice as if the manager and not the ward was the litigant. In pursuance of this purpose S. 31, Court of Wards Act requires a notice of two months before the suit is brought, just as in the case of suits against Government servants. In private suits no such notice is under the ordinary law required. Then S. 35 contemplates suits by the manager on behalf of the ward, a further confirmation of the proposition that the purpose of the Act is to treat the manager, not the ward as the real litigant.

Is the policy of the Gujarat Talukdars' Act similar? If it is, then it is to my mind quite clear that S. 29-G, Gujarat Talukdars Act must be read as making Ss. 31 and 32, Court of Wards Act ap-

plicable to suits against Talukdars in cases such as the present. The reasons for this proposition need no further amplification as it is, I think, accepted by both Shah and Crump, JJ.

But if the policy of the Gujarat Talukdars Act is different, if that Act contemplates the Talukdar himself as the real litigant in other words, if it regards a suit like the present as in substance and in reality a suit against the Talukdar personally, then to apply Ss. 31 and 32, Court of Wards Act, would be to go clean against the policy of the Gujarat Talukdars Act.

The judgments which have led to the reference of this appeal to me show that the matter can be effectively argued both ways. I have therefore to find some considerations which to my mind conclusively point to one solution as correct rather than the other.

I find two such considerations, one purely general, the other peculiar to the circumstances of the two Acts under discussion; and fortunately both point the same way.

The general consideration is this: The application of limitations such as are imposed by Ss. 31 and 32, Court of Wards Act, could be secured for suits against Talukdars by two methods. First by enacting in the Gujarat Talukdars Act provisions similar to Ss. 31 and 32 Court of Wards Act. This method has not been adopted. Or second: by incorporating the provisions by reference; as it is said is done by S. 29, Gujarat Talukdars Act. As to this I feel bound to say that if it is the method adopted by the legislature, it is an unwise, a clumsy and a most confusing method. The provisions contained in Ss. 31 and 32, Court of Wards Act, are special and peculiar. If it is intended to apply them to any particular class of suits, that intention ought to be expressed with unmistakable clarity. Unless the contrary is made manifest the ordinary law as to filing suits must apply to suits against private persons. A suit against a Talukdar is a suit against a private person. I do not see how anyone can say that it is made manifest that Ss. 31 and 32, Court of Wards Act apply to such a suit. It is quite reasonable to infer in spite of the difficulties, that the legislature intended Ss. 31 and 32 to

apply, and this Crump, J., has done; and he may be right; for the intention of the legislature is sometimes an uncertain thing. But no one can, I think say that the intention of the legislature in this matter is made manifest with unmistakable clearness. Yet it would have been very easy to make it clear. On general grounds therefore I infer that the usual law applies and not Ss. 31 and 32.

The particular reason which appeals to my mind is this. In the case of Talukdars there is not as in the case of Government Wards, the same need for such provisions as Ss. 31 and 32, Court of Wards Act contain: for the severance of the Talukdar from his estate is less complete; the management is of a more restricted kind. Consequently there is less need to treat a suit against the Talukdar as if it really were a suit against the manager. What I have said is apparent from the following facts: a manager under the Court of Wards has power to sell exchange, mortgage, charge or let the property: S. 26, Court of Wards Act. A manager under the Gujarat Talukdars' Act has substantially only the power of letting, leasing and getting in the profits: Gujarat Talukdars' Act, S. 29 (1) and S. 30 (2) (c). The manager under the Gujarat Talukdars Act is to divide the surplus receipts amongst the Talukdars S. 29 (3); the manager under the Court of Wards Act disposes of the entire profit in a manner similar to that of a guardian: Ss. 23 and 27, Court of Wards Act. Lastly the manager under the Court of Wards Act is appointed for more than a temporary purpose and usually retains his position as manager so long as the economic condition of the estate requires it. A manager under the Gujarat Talukdars' Act on the other hand is often appointed for a much more temporary purpose, as for example, to avoid danger to the public peace (S. 26), or pending the partition of a Talukdari estate: S. 27. It is true that at the request of the Talukdar a management may come into existence similar to that under the Court of Wards Act (S. 28), and the management in this case is of that kind. But under the Gujarat Talukdars Act this is only one of several descriptions of management; under the Court of Wards Act it is the sole description.

As I have indicated already, where the legislature have made their intentions so obscure a Judge is I think bound to infer that there is no departure from the ordinary law intended, unless expediency or some other consideration compels us to infer that it was intended. I do not think that expediency or anything else compels one to infer that Ss. 31 and 32, Court of Wards Act are applicable to suits against a Talukdar. Even when his estate is under management, a suit filed in the ordinary way can proceed without any serious fear that justice will not be done.

Whether for other reasons altogether the manager in person or in virtue of his office, is a proper or a necessary party to such a suit as the present, is a different matter altogether a matter which has not been discussed and as to which I say nothing.

I therefore hold that the suit in this case is not barred and that the decision of the lower Court is wrong.

The result is that the case is now referred back to the Bench before which it was argued who will presumably dispose of the appeal and make a final order.

G.P./R.K. *Order accordingly.*

A. I. R. 1920 Bombay 127 (1)

MACLEOD, C. J. AND HEATON, J.

Surjaprasad Dwarkadas—Plaintiff—Appellant.

v.

Karmalli Abdulmiya—Defendant—Respondent.

Second Appeal No. 811 of 1918, Decided on 28th November 1919, from decision of Dist. Judge, Thana, in Appeal No. 216 of 1917.

Limitation Act (9 of 1908), Art. 61—Claim for share of expenses of repairs of common well is one for contribution—Art. 61 applies.

A suit to recover a sum of money, being the contribution claimable from the defendant in respect of repairs to a well jointly owned by the parties, is a claim in contribution and must be brought within the period of limitation prescribed by Art. 61. [P 127 O 2]

M. K. Thakore—for Appellant.

P. B. Shingne—for Respondent.

Judgment.—The plaintiff brought this action against the defendant for Rupees 216-12-8, being the contribution claimable from the defendant in respect of repairs to a well jointly owned by the parties. It is admitted that if this suit can come within Art. 61, Lim. Act, the claim is time barred. On the face of it,

it is not a claim for compensation for breach of a contract in writing registered. As a matter of fact this well was jointly owned, was falling into a state of dilapidation, and the Municipality gave notice to the parties to fill it in. They were not able to do that. Then the plaintiff's brother requested that the Municipality might repair the well. Accordingly they did so, and the plaintiff deposited a certain sum for the expenses. Clearly therefore this is a claim in contribution, and I may refer to Rustomji's Limitation Act, p. 367, where he deals with this question. He says:

"In other words, Art. 116 applies only where the right of action rests upon the registered contract, or derives its vital force therefrom. Thus where one co-obligor under a registered contract has been compelled to pay the whole amount secured thereby, he may sue the other for contribution, and to such suit (for contribution) a limitation of only three years will apply, because, although the original indebtedness arose out of the registered contract, yet the claim upon which the action is predicated rests not upon the registered contract, but upon the promise which the law implies on the part of co-obligors to share equally the pecuniary consequences of their venture."

In this case the Municipality having repaired the well, and the plaintiff having deposited the expenses for such repairs, he had a claim for contribution from the defendant. I agree with what is said in that passage, and I think the period of limitation which was applicable to this case was three years and not six. The appeal therefore will be dismissed with costs.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1920 Bombay 127 (2)

SHAH AND HAYWARD, JJ.

Dhondo Wasudeo Kanitkar—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

First Appeal No. 160 of 1916, Decided on 28th July 1919, from the decision of Dist. Judge, Khandesh, in Suit No. 7 of 1914.

Bombay Land Revenue Code (5 of 1879), S. 217—Survey settlement introduced—Inamdar acts illegally when he levies higher rates than fixed at settlement after period of settlement.

Where a survey settlement was introduced into an alienated village with the consent of the alienee under Bombay Act 1 of 1865, and the period of the settlement expired after the Bombay Land Revenue Code of 1879 came into force, S. 217 of that Code is applicable to the

village and an inamdar acts in derogation of the lawful rights of the holders of lands in his inam village in levying higher rates than those allowed under the settlement after the expiry of the period of the settlement. [P 128 C 1, 2]

P. V. Kane—for Appellant.

S. S. Patkar—for Respondent.

Shah, J.—The main point argued in this appeal is whether S. 217, Bombay of the Land Revenue Code applies when a survey settlement is introduced into an alienated village with the consent of the alienee under Bombay Act 1 of 1865, and when the period of the settlement has expired after the Land Revenue Code of 1879 came into force. It is conceded that, if this point is decided against the appellant, the other points decided against him by the lower Court need not be gone into. We have therefore heard the pleaders on this point only, and as we have come to the conclusion that S. 217 would apply to such a village, it has not been necessary to hear the appellant's Pleader on the other points.

The facts relating to this point are few and undisputed. The survey settlement was extended to the village in question on the application of the inamdar in the year 1870 under Bombay Act 1 of 1865 which was then in force. The period of this settlement expired in the year 1888. In 1879 the Land Revenue Code came into force. The inamdar holds the village under a sanad granted under the Summary Settlement Act (Bombay Act 2 of 1863). The plaintiff recovered from 1895 to 1910 higher assessment than that allowed under the survey settlement which expired in 1888. The Commissioner objected to his doing so in 1910, and hence the suit to establish his right to charge higher assessment.

It has been argued on behalf of the appellant that S. 217, of the Bombay Land Revenue Code is not applicable as the survey settlement was introduced prior to the Land Revenue Code of 1879, and not under S. 216 of the Land Revenue Code or under any other law after the passing of the Land Revenue Code. In effect the contention is that the words "when a survey settlement has been introduced" in the beginning of the section really mean "when a survey settlement shall be introduced", and that S. 217 has no application to the survey settlements introduced into alienated villages prior to the enactment of S. 217. Taking however the words of the section in their

plain and natural sense I am satisfied that S. 217 applies not only when a settlement is introduced into an alienated village after the Land Revenue Code of 1879 came into force either under S. 216 or under any law for the time being in force, but also when a survey settlement is introduced prior to it under the provisions of any law for the time being in force, like the settlement in the present case under Act 1 of 1865. No authority is cited on either side touching this point; and in the absence of any authority to the contrary I think that the section must be held to apply, as the words indicate, to a survey settlement which was introduced prior to 1879 and which expired long after the Land Revenue Code came into force, as it would apply to a survey settlement introduced under S. 216 after the Land Revenue Code came into force. It is clear therefore that in 1895, when the inamdar levied higher rates than those allowed under the settlement with the permission of the Collector, he acted in derogation of the lawful rights of the holders of lands in his inam village.

It is not contested, and it seems to me clear, that in virtue of the provisions of S. 217, the holders of lands in an alienated village into which a survey settlement has been introduced are liable to pay like the occupants in an unalienated village only the assessments fixed at the first survey settlement even after the expiry of the period of the settlement, so long as a revised survey settlement is not introduced.

The terms of the sanad do not make any difference in the position of the inamdar. If S. 217 applies, I do not think that under Cl. 3 of the sanad the inamdar can levy rates higher than those which are lawfully leviable from the holders of the lands subject to the provisions of S. 217. All the lawful rights of the holders of lands are expressly saved by the clause. The plaintiff's contention therefore on this point must be disallowed.

In holding that S. 217 applies to this alienated village, I have not overlooked the view taken by Beaman, J., in *Pandu v. Ramchandra Ganesh* (1) that the section does not apply to an alienated village where the grant is of the soil and not merely of the royal share of the

(1) [1918] 42 Bom. 112=48 I.C. 738.

revenue. That view however has not been accepted in the case of *Dadoo v. Dinkar Vishnu* (2), in which it has been held that an alienated village, whether the grant be of the soil or merely of the royal share of the revenue, would be within the scope of S. 217. We are bound by this decision, and I agree with the view taken in that decision that the application of S. 217 to an alienated village is not dependent upon the grant being merely of the royal share of the revenue.

The result is that the decree of the lower Court is affirmed and the appeal dismissed with costs.

Hayward, J.—The appellant is the inamdar of the village of Bondan. The survey settlement was introduced into his village under S. 49, Survey Settlement Act 1 of 1865 in the year 1870. The period for which the settlement was guaranteed was 18 years. This expired in the year 1887-88. There was a clause in his sanad which was issued to him under the Summary Settlement Act in 1879 which guaranteed all the rights and privileges of the minor inamdars, cultivators or sub-tenants, after the expiration of the survey settlement. The inamdars nevertheless raised their assessment in the year 1895 and continued to levy the increased assessments up to the year 1909-10. This had been allowed with the approval of the Collector, but was then decided to be illegal and was prohibited by the Commissioner whose order was confirmed in 1911 by the Governor-in-Council. The appellant has contended that he was free to raise the assessment after the expiration of the period of the survey settlement, and that would, no doubt, be the case if all the rights and privileges of the minor inamdars, cultivators or the tenants ceased with the expiration of that period. It has been necessary therefore to consider what those rights and privileges were at the expiration of the period of the survey settlement under the law relating to land revenue. It has not been disputed that the result would be the same whether the inamdar was the alienee of the soil or merely alienee of the land revenue as decided in the case of *Dadoo v. Dinkar Vishnu* (2).

The rights and privileges of holders of land in unalienated villages would seem

to be the same to all practical intents and purposes under the Survey Settlement Act 1 of 1865 as under the later Act, the Bombay Land Revenue Code of 1879. Those rights and privileges have been discussed at length in the case of *Secy. of State v. Sadashiv Abaji* (3), and the sum and substance of the discussion was this that they were entitled to continue in possession of their lands at the assessment already settled pending sanction to a revision settlement being granted by the Governor-in-Council. If the holders of lands were bound by the same rules in the alienated village of Bondan, then they also would be entitled to hold their lands on the assessment under the old settlement pending sanction being granted to revised rates by the Governor-in-Council. No such sanction was obtained. On the contrary it was expressly repudiated in 1911 by the Governor-in-Council. The question whether the holders of lands in this alienated village of Bondan have the rights and privileges of holders in unalienated villages would depend upon the correct interpretation of S. 49, Survey Settlement Act 1 of 1865 and the substituted S. 217, Bombay Land Revenue Code of 1879. It seems to me that they were entitled to rights and privileges similar to those of holders in unalienated villages both under the proviso to S. 49, Bombay Act 1 of 1865 and under the provision of S. 112 read with the wide expressions used in S. 217, Bombay Act 5 of 1879. The words used in the opening clause were :

"When a survey settlement has been introduced . . . under the provisions of any law for the time being in force into an alienated village."

Those words would in their ordinary meaning include a survey settlement introduced previously under a previous law in force as well as a survey settlement introduced subsequently under a subsequent law for the time being in force. The words used in the following clause were :

"The holders of lands to which such settlement extends shall have the same rights in respect of the lands in their occupation as holders of lands in unalienated villages have under the provisions of this Act."

The plain meaning of those words would be that they would from the time of the introduction of the Act have the same rights and privileges as holders in

(2) [1919] 48 Bom. 77=47 I.O. 745.

(3) [1912] 36 Bom. 290=14 I.O. 484.

unalienated villages under the Act. That would include the right to hold their lands upon the assessments previously settled under the previous Act, which would be deemed to be in force by reason of the provisions of S. 112 of the new Act pending sanction to revised rates of settlement being granted by the Governor-in-Council under the new Act. If that view be correct, then the levy of the increased assessments without such sanction was illegal and was rightly forbidden by the Commissioner and his order rightly confirmed by the Governor-in-Council. It should also be mentioned that were the other view held, it would only have effect up to the year 1914, because in that year a revision survey was formally sanctioned on the application of the inamdar to Government under S. 216, which would in any case be governed by the provisions of S. 217, Bombay Land Revenue Code of 1879.

It seems to me therefore that the appeal ought to be dismissed with costs.

G.P./R.K.

Decree confirmed.

A. I. R. 1920 Bombay 130

MECLEOD, C. J. AND HEATON, J.

Tipangavda Sandawangarda Gardar — Appellant.

v.

Ramangavda Venkangavda Gardar — Respondent.

Second Appeal No. 416 of 1918, Decided on 25th July 1919, from decision of Dist. Judge, Dharwar, in Appeal No. 4 of 1916.

Civil P. C. (5 of 1908), O. 21, R. 89—Application under R. 89 must be made to Court and not to Collector executing decree by sale.

An application under O. 21, R. 89, Civil P. C., to set aside an auction sale must be made to the Court. [P 131 C 1]

The Collector or other officer conducting the sale is not the "Court" within the meaning of O. 21, R. 89. Therefore an application under that rule made to the Collector or other officer cannot be considered as having been properly made. [P 130 C 2]

S. Y. Abhyankar—for Appellant.

G. S. Mulgaonkar—for Respondent.

Macleod, C. J.—This was an application by the judgment-debtor to have an auction sale held by the Mamlatdar of Hangal set aside under O. 21, R. 89, on the ground that he had deposited in the mamlatdar's office Rs. 154-12-10, including 5 per cent of the purchase money and had applied to the mamlatdar to set

aside the sale that was held on 15th April 1915, but was referred to the civil Court. As the Court was closed and reopened on 19th May, the period of limitation expired on the 19th May, but the application was not made until 13th July. It was then argued that the application to set aside the sale made to the mamlatdar was an application to the Court, and that therefore it was within time. The trial Judge disallowed the application, and this order was reversed on appeal, mainly on the authority of *Mathuji v. Kondaji* (1) where it was held by the Court that the application and deposit to a Revenue Officer should be looked to on the question of limitation. That decision was under S. 310-A, Civil P. C. of 1882, and the learned Judges thought that having regard to the words of that section the essential fact upon which the action of the Court was to depend was the deposit within 30 days, and not the fact that the application was to have been made within that period. But now the period of limitation for an application to set aside a sale is transferred from the Civil Procedure Code to the Limitation Act, and it is expressly provided that such an application must be made within 30 days from the date of the sale. It has been argued that the Collector or the Mamlatdar or the Revenue Officer executing a decree comes within the definition of the word "Court" so that this application was made within time.

Now it is obvious that the Revenue Officer under the rules passed under S. 320 of the old Code, which are still in force, has no power to consider an application to set aside a sale. If the application be made to the Collector or other officer within the time limited by law, then he should refer the applicant to the civil Court. That, as I read R. 17 of the rules, means that the Collector or other officer cannot be considered as a Court within the meaning of O. 21, R. 89 or the corresponding S. 310-A of the old Code, and therefore the judgment-debtor who presents his application to the Collector cannot stop limitation running against him, unless after having been referred to the civil Court he presents his application there within 30 days. He is not protected by S. 14, Limitation Act, which only excludes time during which a

(1) [1905] 7 Bom. L. R. 263.

party has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal against his opponent. But I see no hardship in this. It is quite clear that the application to set aside the sale must be made to the Court. The party desiring to make that application has 30 days within which to make it. If he makes it to a Collector or a Revenue Officer so shortly before the period of limitation expires that he has no time to go to Court, then that is his own fault. Here in this case there is no hardship whatever. The judgment-debtor had over a month in which to present his application to the Court after he had been referred to the Court by the mamlatdar, and he did not choose to present his application until July. In my opinion therefore the order of the lower appellate Court was wrong. We allow the appeal, set aside the decree of the lower appellate Court and restore that of the trial Court with costs.

Heaton, J.—I agree. Primarily an application under O. 21, R. 89, Civil P. C., must be made to the Court. The application in this matter was undoubtedly made to the wrong person in the first instance, and not made to the Court until long after the time allowed, unless the Collector or the mamlatdar can be regarded as authorized to receive such applications on behalf of the Court. We are asked to infer such authorization from R. 17 of the rules. It seems to me this rule can best be read as meaning that the Collector should not receive applications, but should return them to any one presenting them to him with an intimation that the persons presenting them must go to the civil Court. On that interpretation of R. 7 it follows that this appeal must succeed, and I agree with the order proposed.

G.P./R.K.

Appeal allowed.

*** * A. I. R. 1920 Bombay 131**

MACLEOD, C. J. AND HEATON, J.

Someshwar Jethalal and others—Plaintiffs—Appellants.

v.

Chunilal Nageshwar—Defendant—Respondent.

Second Appeal No. 489 of 1918, Decided on 2nd December 1919, from decision of Dist. Judge, Ahmedabad, in Appeal No. 324 of 1916.

*** * Tort—Nuisance—Tree belonging to defendant standing partly on plaintiff's land—Plaintiff held not entitled to cut branches or roots.**

Where a tree stands on the land of both the plaintiff and the defendant and is owned by the defendant who enjoys the fruits thereof, the plaintiff is not entitled to remove the roots, stem and branches of the tree owing to the tree putting its roots through his land and owing to its branches overhanging his land. [P 131 C 2]

R. J. Thakor for C. N. Pandya—for Appellants.

Macleod, C. J.—The plaintiffs sued for the removal of such of the roots, stem and branches of the plaint mango tree as encroached upon and overhung their land and thereby caused damage to the crop in the plaint land. The suit has been dismissed in two Courts, and in this Court we have not had the advantage of bearing counsel for the respondent. The facts of this case show that this tree, subject-matter of the suit, grows partly on the plaintiffs' land and partly on the defendant's land, and for certainly fifty years it has been considered to be the defendant's tree, and the defendant has enjoyed the fruits of it. These being the facts, the question arises whether the plaintiffs are entitled to cut off the branches and roots of the tree which overhang and grow on their land respectively. We have been referred to the decisions in *Vishnu Jagannath Joshi v. Vasudeo Raghunath Oka* (1) and *Hari Krishna Joshi v. Sankar Vithal* (2). No doubt in those cases it was held that an owner of land whose neighbour's tree overhangs his land is entitled to cut away the branches which overhang his own land, although they may have done so for more than forty years. But it seems to us that the facts in this case can be distinguished from the facts in those cases. In *Vishnu Jagannath v. Vasudeo Raghunath Oka* (1) the facts were exactly the same as in the earlier case of *Hari Krishna v. Shankar Vithal* (2), whereas in this case the tree stands on the lands of both parties, and it has been admitted that the defendant is the owner of the tree and is entitled to all the fruits of his tree although he may thereby trespass on the plaintiffs' land. But to hold on these facts that the plaintiffs are entitled to cut off the roots and stem and branches (which are on the side of a line drawn upwards from the boundary) would

(1) [1919] 48 Bom. 164=47 I.C. 629.

(2) [1895] 19 Bom. 420.

be most unfair and also inconsistent with any law to which we have been referred on the subject. This is a special case which stands on its own facts. The facts show that the defendant is the owner of the tree, and that the plaintiffs must therefore put up with the disadvantages which exist owing to the tree putting its roots through his land, and owing to its branches overhanging his land. It must be remembered that in this country it often happens that a tree, though standing in the middle of the land of *A*, yet belongs to *B*. I think therefore the decision of the lower Court was right and the appeal must be dismissed.

Heaton, J.—I concur.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 132

SHAH AND CRUMP, JJ.

Vaikunt Shridhar Bhatta—Plaintiff—Appellant.

v.

Manjunath Madhav Bhandari and another—Defendants—Respondents.

Second Appeal No. 892 of 1918, Decided on 9th January 1920, from decision of Dist. Judge, Kanara, in Appeal No. 22 of 1918.

Civil P. C. (5 of 1908), O. 21, R. 60—In execution of decree attachment made—Objection by charge-holder allowed—Property sold subject to charge—On suit by purchaser defendants contended that sale was illegal being without attachment—Court ordering illegal sale subject to charge treated attachment as subsisting—Sale therefore held valid.

S obtained a decree against *B* and in execution attached properties Nos. 1 and 2. *K*, the mother of *B*, objected to the attachment and applied to have it raised, on the ground that property No. 2 was in her possession which she was entitled to retain during her lifetime and that there was a charge thereon for her funeral ceremonies and that property No. 1 was subject to a charge for her maintenance. Her application was granted, but thereafter on the application of *S* the Court directed sale of both properties, subject to the charges claimed by *K*. The right, title and interest of *B* in the property subject to the charges were put up for sale and were purchased by the plaintiff who, on the death of *K*, sued for partition claiming a one-fourth share, which represented the interest of *B*. *B* and his brother *M* contended that there was no attachment of the property and that therefore the sale was void. The trial Court, holding that the sale was valid, decreed the claim, but on appeal by *M* this decision was reversed on the ground that the sale was void because there was no subsisting attachment. On second appeal:

Held: that the executing Court having treated the attachment as being still in force when it ordered the property to be sold, there was a

sufficient attachment, that the sale was not void and that, consequently, the plaintiff was entitled to a decree. [P 134 C 1]

G. P. Murdeshwar—for Appellant.

Nilkant Atmaram—for Respondents.

Shah, J.—The facts which have given rise to this appeal are these:

Certain properties including the property in suit formed the subject-matter of a partition among four brothers, defendants 1 and 2, father of defendant 3 and one Venkatraman. At that partition the property in suit was given to their mother during her lifetime for her maintenance. One Sheshgiri obtained a decree against defendant 2 and in execution of that decree he attached two lands, plaint serial Nos. 1 and 2, Kaveri, the mother of defendant 2, objected to the attachment and made an application for having the attachment raised on the ground that plaint serial No. 2 was in her possession; that she was entitled to retain it during her lifetime and that there was a charge thereon for certain sums to be paid by the brothers for her funeral ceremonies after her death. The allegation as to the other land was that it was subject to a charge of her maintenance at a certain monthly rate. This application was granted on 16th August 1901. Thereafter on the darkhast of Sheshgiri an order was made on 30th October 1901 directing the sale of both the properties, including the property plaint serial No. 2, subject to certain charges which were claimed by Kaveri in her application.

The right, title and interest of defendant 2 in the property were put up for sale subject to the charges mentioned in the order of 30th October and the plaintiff purchased the same. The sale was duly confirmed and apparently no objection was taken to the sale thereafter either by the decree-holder or the judgment-debtor. Kaveri died in 1915, and the auction-purchaser filed the present suit in 1917 for the partition of the property described as plaint serial No. 2 and claimed his one-fourth share which represented the interest of defendant 2 in the property. Defendants 1 and 2 contended that in fact there was no attachment of the property in question and that the sale in the absence of any previous attachment was void according to law. Defendant 3 did not appear, and defendant 4, who was a 'purchaser of the

share of Venkatraman, claimed that on partition his one-fourth share might be assigned to him.

The trial Court found that the plaintiff property was released from attachment at the date of the sale, but that Court came to the conclusion that the sale was valid in spite of the absence of a formal attachment at the date of the sale. Accordingly a decree was passed in favour of the plaintiff, allowing him his one-fourth share in the plaintiff serial No. 2 by partition. There was also a decree for past mesne profits and future mesne profits against defendant 2. Defendant 4 also was allowed under the decree to recover his one-fourth share by partition in the property.

Defendant 1 appealed to the District Court from this decree against plaintiff and defendant 4. He did not join defendants 2 and 3 as respondents to his appeal. The appellate Court came to the conclusion that the property had been sold by the Court when it was not under attachment and that the sale was void in consequence of the absence of attachment at the time. The learned District Judge accordingly reversed the decision and allowed the appeal with costs.

In support of the appeal, which has been preferred from the decree of the District Court, it has been urged that the property was under attachment in fact when the execution proceedings relating to sale of the right, title and interest of the present defendant 2 went on in the executing Court on the darkhast filed by Sheshgiri, that even if there was no attachment the sale was not void, and that under the circumstances of this case it was not open to the lower appellate Court to reverse the decree on the appeal of defendant 1 as defendant 2 had not joined him in the appeal.

We have heard the pleader for the respondent on the first and the last points and in the view which we take of those points we have not considered it necessary to hear him fully on the question as to whether the sale effected by the Court in the absence of any prior attachment would be valid or not.

It may be noted that in the appeal preferred to this Court by the plaintiffs defendants 2 and 3 have not been joined as parties.

The first point to be considered is whether the lower Courts are right in their

view that there was no attachment of the property which was put up for sale. The facts relating to the point are that the property was in fact attached in the first instance on the application of Sheshgiri, that there was subsequently an order on Kaveri's application and that later on in the darkhast proceedings there was an order stating the effect of the order on Kaveri's application. If the effect of the order is correctly stated by the executing Court in its order of 30th October 1901, it seems to me that the property was duly attached at the time. To start with, in this case there was an attachment of the property on the darkhast of Sheshgiri. It is urged on behalf of the respondent that that attachment was raised by an order on Kaveri's application under R. 60 of O. 21. If the order stood by itself, there would be much to be said in favour of the view that the attachment was wholly raised so far as the property in question was concerned. But the order is very brief and it is quite clear that in its entirety it is difficult to apply it with reference to the other property which formed the subject-matter of that application and of the attachment.

As regards the other property the claim of Kaveri was that it was subject to a certain charge. As regards the property now in question her claim was that she was in possession and that she was entitled to enjoy the property during her lifetime. No doubt in the application she proceeded to say that defendant 2 had no right to the property. But it is clear that her meaning was that during her lifetime he had no right to the property, and that it was subject to a certain charge for her funeral expenses. In October 1901 when in executing the decree in favour of Sheshgiri the Court read this order as meaning that the right, title and interest of defendant 2 in the property was liable to be sold subject to the interest of Kaveri, which was stated in the order, it seems to me that the executing Court which had passed the order on Kaveri's application interpreted it in a manner in which it was reasonably capable of being interpreted. If the order had been in that form in terms, it seems to me that it would have been a valid order under R. 60 which enables the Court to make an order releasing the property wholly or to such extent as it thinks fit from attachment. The order

having been so interpreted by the executing Court and the prior attachment having been treated as being still in force the property was put up for sale. In due course the plaintiff purchased the right, title and interest of the present defendant 2 in the property. I do not see how it could be said that there was absolutely no attachment of the property in question. It is clear on the allegation of Kaveri in that application that the judgment-debtor had some saleable interest at the time; and though the order was in a general form, it was rightly understood by the executing Court to mean that the property was liable to be sold, subject to Kaveri's interest therein. I am clearly of opinion that the property was sufficiently attached and that all the subsequent proceedings including the sale of the right, title and interest of the judgment-debtor were in order, and there is no real basis for the objection that the sale is void in consequence of the absence of any attachment.

In this view of the matter it is not necessary to consider the interesting question as to whether in the absence of an attachment a sale effected by the Court would be valid or not. In favour of its validity reliance was placed in the course of the argument upon the decision in *Kishory Mohun Roy v. Mohamed Muzaffar Hossein* (1) and *Malkarjun v. Narhari* (2). On the other hand in favour of the view that in the absence of any prior attachment the sale would be void reliance was placed upon the case of *Balkrishna v. Masuma Bibi* (3). It is not necessary, as I have said, to express any opinion on this question, as in my opinion the property was under attachment subject to Kaveri's interest at the material time.

The only other question which requires consideration is whether on the appeal of defendant 1 alone the lower appellate Court could have passed the decree now under appeal. It becomes necessary to consider that question as defendants 2 and 3 have not been joined as parties to this appeal. It would have been far more satisfactory if they had been joined as parties to this appeal, quite apart from the consideration as to whether they

were parties to the appeal in the lower appellate Court. In the trial Court defendant 2 joined defendant 1 in raising the question as to the validity of the Court sale. But that Court decided the question against them, and defendant 2 did not appeal from the decree for partition which was passed on the basis that his right, title and interest had been validly conveyed to the plaintiff. It seems to me under the circumstances that defendant 2 not having appealed, it was not open to defendant 1 to object to partition on that ground. Admittedly the defendants were tenants-in-common and there could be no doubt that either defendant 2 or the person claiming to be the owner of his right, title and interest would be entitled to his share. Defendant 1 never contended that defendant 2 had no share in the property. Though it might appear that the point which was raised in the appeal was one which was raised in the trial Court, in view of the fact that defendant 2 did not appeal from that decree, it cannot be said that defendant 1 could raise a point which it was open to defendant 2 primarily to raise and which by his omission to appeal he must be taken to have given up. It seems to me, therefore, that on the appeal of defendant 1 the decree of the trial Court could not have been properly reversed. In that view of the matter in spite of the absence of defendants 2 and 3 on the record of this appeal, I have come to the conclusion that this appeal may be disposed of without further delaying the proceedings by directing defendants 2 and 3 to be joined as parties to the appeal.

On these grounds I would allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs of this appeal and in the lower appellate Court on defendant 1.

Crump, J.—I concur.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 134

MACLEOD, C. J. AND HEATON, J.
Maina Hari Tarde—Appellant.

v.

Shankar Moru Tarde—Respondent.

Second Appeal No. 392 of 1918, Decided on 2nd December 1919, from decision of First Class Sub-Judge, Satara, in Appeal No. 445 of 1916.

(1) [1891] 18 Cal. 188.

(2) [1901] 25 Bom. 337=27 I. A. 216=7 Sar. 739=2 Bom. L. R. 927=5 C. W. N. 10=10 M. L. J. 368. (P. C.).

(3) [1883] 5 All. 142=9 I. A. 182=4 Sar. 393=13 C. L. R. 232 (P. C.).

Guardians and Wards Act (8 of 1890), S. 36—Suit against guardian—Permission of Court obtained subsequently cures defect.

The fact that the leave of the Court under S. 36, is not obtained to the institution of a suit against the guardian of the property of a minor, is not fatal to the suit if such permission is obtained before the suit comes on for hearing.

[P 135 C 2]

Jayakar and S. R. Parulekar—for Appellants.

K. N. Koyajee—for Respondent.

Macleod, C. J.—The plaintiff, a minor, filed this suit by his next friend for an account under S. 36, Guardians and Wards Act, 8 of 1890. Defendant 1 is the guardian of the property appointed by the District Court of Satara. Defendants 2 and 3 are the sons of defendant 1 and are alleged to be managing the minor's property under defendant 1. The trial Court took an account and directed that the defendants should pay the minor plaintiff's next friend the sum of Rs. 510 only and the costs of this suit. In appeal that decree was confirmed.

The only point which has been taken in second appeal is that the whole of this proceeding should be avoided because the plaintiff's next friend did not obtain the leave of the Court under S. 36, Guardians and Wards Act, before he filed this suit. Leave as a matter of fact was obtained on 26th January 1916 before the suit came on for hearing. There are cases in which the failure to obtain the leave of the Court required by a particular Act is fatal to those proceedings. For instance it has been held that if leave, when it is necessary, is not obtained under Cl. 12, Letters Patent, the mistake cannot be remedied after the suit has been filed, because it is only by obtaining leave that the plaintiff in such a suit can bring it within the jurisdiction of the Court. But in this case it appears to us from the provisions of S. 36, Guardians and Wards Act, that leave of the Court must be obtained by a person who wishes to institute a suit against a guardian merely for the protection of the guardian and such a provision does not go to the jurisdiction of the Court. If the suit is filed without leave, then as soon as the attention of the Court is drawn to that fact, the proceedings will be stayed: but I do not think that the proceedings are entirely nullified for want of leave. It would be open to a Court, on a proper application by the plaintiff,

to remedy such a mistake, and if it thinks fit to empower the plaintiff to continue the proceedings against a guardian. In this case the plaintiff's next friend is, as a matter of fact, the guardian of his person. No doubt he considered himself as such guardian empowered to look after the interests of the minor, when he saw that those interests were not being properly looked after by the guardian of the property. That no doubt was the cause of the mistake. We think that the Court was perfectly right in coming to the conclusion that that mistake was remedied by the order made giving leave to the plaintiff's guardian to continue the suit. Therefore I think the order of the Court below was correct and the appeal must be dismissed with costs.

Heaton, J.—I agree, but I should like to add this. The directions contained in an Act of the legislature are intended to be followed, and it seems to me that it cannot be said that a suit of this kind is rightly filed when it is filed without leave previously obtained of the Court. But it does not follow that if this is not done, the plaint must be handed back to the plaintiff to be re-dated and again handed back to the Court after leave is obtained. I think that everything that the section requires is obtained if you regard the suit as effectively filed on the day on which leave is given by the Court. This might be a very material matter if a question of limitation arose. In this case however there is no such question and I think the appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 135

SHAH AND CRUMP, JJ.

Abdul Majid Khan — Defendant 1—Appellant.

v.

Husseintu—Plaintiff—Respondent.

Second Appeal No. 103 of 1918, Decided on 17th November 1919, from decision of Dist. Judge, Poona, in Appeal No 37 of 1917.

Mahomedan Law—Gift — Delivery of possession—Donor and donee in same premises—Some overt act must be shown — Delivery cannot be presumed — Intention depends on circumstances.

Under the Mahomedan law a gift is invalid unless there is a delivery of possession. Where the donee is with the donor on the premises at the time of the gift, an appropriate intention

may put the one out as well as the other into possession without any actual physical departure or formal entry. But it does not follow in every case necessarily that where the two are present, possession must be deemed to have been transferred. The question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case.

[P 136 C 1,2]

A. G. Desai—for Appellant.

D.R. Manerikar—for Respondent.

Judgment. — This appeal arises out of a suit brought by a Mahomedan widow to recover her dower and her share in the property of her deceased husband.

The first point urged in support of the appeal is that her claim to dower is time barred. Both the Courts have decided in favour of the plaintiff. The decision on this point really depends upon the question of fact as to whether there was any demand and refusal during her husband's lifetime. The finding is in favour of the plaintiff, which must be accepted in second appeal. The point therefore fails.

The second point relates to the gift of a house. Defendant 1 pleaded that the house in question was given to him by way of gift by his grandfather on 8th July 1912 and relied upon a registered deed of gift. Both the Courts have found that there was no delivery of possession and that the gift is invalid. It is urged that there was a transfer of possession so as to make the gift valid. It is clear that the registered deed of gift by itself is not sufficient. According to the Mahomedan law there must be a delivery of possession. In the present case it is found by the trial Court, and this finding has been acquiesced in by the lower appellate Court, that the donor did not give up his control over the property, and continued in possession of the house until his death in November 1912. The application put in by defendant 1, who is the son of the donor's daughter, in January 1913 before the Municipal authorities shows that the possession had remained all along with the donor during his lifetime. It is urged however that the donee was with the donor on the premises at the time of this gift and that under the circumstances the possession must be deemed to have been transferred to him. In support of this view reliance is placed upon certain observa-

tions in *Shaik Ibrahim v. Shaik Suleman* (1). It may be, as pointed out in that case, that an appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry. But it does not follow in every case necessarily that where the two are present, the possession must be deemed to have been transferred. The question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case. In the present case on the evidence the trial Court has definitely found that there was no transfer of possession. The appellate Court has given no reasons for accepting this finding, and that has necessitated our examining this question at greater length than we might otherwise have to do. In spite of the omission on the part of the District Judge to give reasons in support of the finding that there was no transfer of possession, we think that the finding must be accepted now. The gift was therefore invalid.

Lastly, it is urged that the plaintiff had certain ornaments which she was bound to account for before she could be allowed to claim her share out of her husband's estate. It is clear from the admitted facts in the case that soon after the marriage between the plaintiff and her husband in 1899 there were differences between them. These ornaments were never effectively claimed by the husband during his lifetime, although in Suit No. 215 of 1899 a reference was made to them by the husband. It follows that either these ornaments never formed part of the husband's estate or if they formed part of his estate once, they had ceased to form part thereof in November 1912, when he died. This point also must be disallowed.

The result is that the decrees of the lower appellate Court is confirmed and the appeal is dismissed with costs.

G.P./R.K.

Appeal dismissed.

(1) [1885] 9 Bom. 146.

A. I. R. 1920 Bombay 137 (1)

MACLEOD, C. J. AND HEATON, J.

Balubhai Vijbhukhandas and others—
Plaintiffs—Appellants.

v.

*Secretary of State—*Defendant—Respondent.

First Appeal No. 234 of 1917, Decided on 2nd December 1919, from decision of Dist. Judge, Surat, in Suit No. 1 of 1917.

Ownership—Annexures to letters cannot be claimed back—Right of suit.

Where a person annexes copies of documents to a letter, unless he expressly asks that those copies be returned to him, he does not retain any property in the copies as they are part of the letter and the property in them remains with the person to whom they are sent.

[P 137 C 1,2]

*H. V. Divatia—*for Appellant.*S. S. Patkar—*for Respondent.

Judgment.—This suit which was filed by the plaintiffs against the Secretary of State for India in Council was one of a very peculiar nature. The plaintiffs had sued the Surat Municipality and the Deputy Collector, the cause of action being an alleged illegal removal of the plaintiffs' *otta* from their house in Surat. Then the plaintiffs served a notice of the suit against the Secretary of State for damages for the tort committed by the defendant's servant, the Deputy Collector. With that notice the plaintiffs sent two documents, one being a typewritten copy of their *sanad* or title-deed with regard to the house in question which was prepared by their pleader; and the second a certified copy which had been supplied to them by the Survey Office on 22nd November 1912. The notice of suit was sent on 11th February 1916. On 7th June 1916 plaintiffs applied for the return of these two copies, and were referred by the Under Secretary to Government to the Collector of Surat. That officer, on 24th June 1916, declined to return the two documents on the ground that they were accompaniments to the notice. The plaintiffs then served notice on the 5th October 1916 that they would file this suit claiming return of these two documents. The District Judge dismissed the suit, and we think that that decision was perfectly correct. It appears to us a most extraordinary claim, since when a party writes to Government or to any other person enclosing copies of certain documents, he does not retain any property in these documents, unless he ex-

pressly asks in his letter that those documents should be returned to him. If he does not do so the copies annexed to a letter are part of the letter and the property in them remains with the persons to whom they were sent. The appeal in this Court has not been pressed, and is, therefore dismissed with costs. First Appeal No. 225 of 1917 is dismissed with costs.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1920 Bombay 137 (2)**

MACLEOD, C. J. AND HEATON, J.

*Shivajirao Narayanrao Thorat—*Defendant—Appellant.

v.

*Hari Narayan Tagre—*Plaintiff—Respondent.

First Appeal No. 251 of 1917, Decided on 13th January 1920, from decision of Addl. 1st Class Sub-Judge, Satara, in Suit No. 242 of 1916.

Bombay Court of Wards Act (1 of 1905), S. 16—Collector's offer even if not accepted can be used as acknowledgment under Limitation Act, S. 19.

Although an offer made by the Collector under S. 16, Bombay Court of Wards Act, cannot be proved in a suit filed by the claimant if he does not accept the offer, yet the proviso to the section does not prevent the claimant from using the letter as an acknowledgment so as to start a fresh period of limitation under S. 19, Lim. Act.

[P 138 C 1,2]

*Coyajee and S. S. Patkar—*for Appellant.*Dhurandhar and G. B. Phansalkar—*for Respondent.

Macleod, C. J.—The plaintiff sued to recover in this suit the amounts due on three mortgage bonds passed by the defendant's family. The defendant was a minor and a ward of the Collector under the Court of Wards Act (Bom. Act 1 of 1905). Three bonds had been passed: (1) in 1886 for Rs. 9,500 on a simple mortgage for ten years; (2) a bond in 1887 for Rs. 500; and (3) a bond in 1891 for Rs. 3,200, which purported to be a mortgage with possession for two years. It is admitted that the mortgagee has not got possession. It is also clear that the bond of 1887 for Rs. 500 is barred. The plaintiff had obtained decrees on the other two bonds in 1886 and 1891. The learned Subordinate Judge considered that Art. 147 applies, but in doing so he seems to have overlooked or misunderstood the decision of the Privy Council in the case of *Vasudeva Mudaliar v. Sri.*

nivasa Pillai (1). It cannot be disputed that it is not Art. 147 but Art. 132 which applies. However, the Subordinate Judge has considered the question whether Ex. 53, which was a letter written to the plaintiff by the Collector of Satara on 24th May 1913, saved the bar of limitation as regards the bond of 1886, and came to the conclusion that it did. It has been argued before us that under the proviso to S. 16, Bombay Court of Wards Act, that letter could not be proved. Ss. 13, 14, 15 and 16 deal with the duties of the Collector when the Court of Wards assumes superintendence of the property of any landholder under the Act. Under S. 14 a notice was issued inviting claims and it appears that the plaintiffs made an application through the mamlatdar on 13th May 1913, and they also sent in a petition to the Collector on 23rd May in which are recited the three bonds I have referred to. On 24th May the Collector wrote to the plaintiff:

"An application dated 13th May 1913 was made through the Mamlatdar of Walwa, stating that proceedings were going on regarding the amount due from the minor Shivajirao Narayanrao and that its result was not known. On this, he is informed that according to the compromise arrived at regarding the whole of the amount due, we have decided that Rupees 17,000 are to be paid and they are to be paid in the following manner: Rs. 4,000 are to be paid for the first instalment, and thereafter Rs. 2,000 each year, and Rs. 1,000 for the last instalment. So you and Balwant Narayan are to be present either personally or through mukhtear in our office and then the amount of the first instalment would be paid by me."

The word "compromise" seems to be wrongly used. What the Collector did was to consider the claim under S. 16. The letter amounted to an offer of a settlement of the claim sent in by the petitioners. Sub-S. (2), S. 16, lays down what should be done by the claimant. Sub-S. (3) provides that nothing in the section shall be construed to bar the institution of a suit in a civil Court for the recovery of a claim against a Government ward or his property which has been duly submitted to the Court of Wards. Then comes a proviso:

"provided that no decision of the Court of Wards under this section shall be proved in any such suit as against the defendant."

The plaintiffs contend that although what amounted to an offer by the Collector under S. 16 cannot be proved in a

suit filed by the claimant if he does not accept the offer, yet the proviso does not prevent the claimant from using the letter as an acknowledgment so as to start a fresh period of limitation under S. 19, Lim. Act. That appears to us to be the proper interpretation of the proviso read in conjunction with the previous sections. It must be restricted to meaning that if the claimant files a suit on his claim, the Collector's offer cannot be proved as an admission: the claimant must prove his case *de novo*, and the Collector is not bound by any offer which he may have made under S. 16. But we do not think that the proviso bars the claimant from using the offer as an acknowledgment that the debt exists. As it has not been distinctly provided that such a decision or proposal or offer by the Court of Wards shall not be used as an acknowledgment, we think it is open to the claimant to make use of such a decision merely for the purposes of an acknowledgment. Otherwise it would work very great injustice, and certainly in this case would operate as a very great hardship on the petitioners. But the acknowledgment will only save limitation with regard to the bond for R. 9,500. It is admitted that nothing was paid on the bond for Rs. 3,200, and a suit on that bond was clearly barred before 24th May 1913. The plaintiffs have obtained a decree for the amount of that bond and interest from the Subordinate Judge on his finding that Art. 147 applies. We think therefore that the decree must be amended and that the direction on the defendants to pay Rs. 6,400 with costs by annual instalments must be struck out. The decree will therefore, stop at the figure "9,500." The respondents will be entitled to the costs in proportion to the extent to which they have succeeded.

Heaton, J.—I agree. The matter of importance and of some difficulty which has been argued at the hearing of this appeal relates to the meaning of the proviso to S. 16, Court of Wards (Bom. Act 1 of 1905). There was a decision, what is called a decision in the section by the Collector, and that decision undoubtedly amounts to an acknowledgment of certain mortgage debts. But it is said that in virtue of the proviso to the section the decision cannot be proved against the defendant. Now I admit quite frankly that if you take the words of the proviso

(1) [1907] 30 M. d. 426=34 I. A. 186=17 M. L. J. 444=4 A. L. J. 625=9 Bom. L. R. 1104=11 C. W. N. 1005 (P. C.).

away from the rest of the section, and consider them by themselves, they do undoubtedly mean that the decision is not to be proved against the defendant.

If that is what the words say, it is argued we must presume that the words mean that. Of course it is to be presumed that the words mean what they say, and if they mean that, then it is further argued that this decision cannot be proved against the defendant. It does not matter for what purpose you wish to use it. But when you have a proviso of this kind, when you have something which is a portion of a larger whole, then to discover the purpose of its existence you have to look to that larger whole. The purpose of the whole section is very clear. It is to enable the Collector to have an absolutely free hand in making compromises on behalf of a ward, with the ward's creditor. In order that he may have an absolutely free hand, and that he may not be fettered by fears of what may be said afterwards as to what he has done, it is provided that these offers, or decisions as they are called, cannot be proved against the defendant in a suit subsequently brought. Clearly the meaning is that whatever the Collector has asserted or admitted shall not be used as proof of any claim by the plaintiff in a suit against the defendant; and that the plaintiff has to prove his claim fully by evidence altogether outside anything that the Collector in the course of the discussion or negotiation may have written in his decision or offer. But if we go beyond this, if we say not only that the decision shall not be proved for the purpose of establishing the plaintiff's claim, but also that it shall not be proved even for the purpose of showing that the Collector acknowledged the claim, then I think we should be going right outside the intention and purpose of the section as a whole. That is why I think this decision can be proved as an acknowledgment, because I think not only does the section as a whole, having regard to its purpose and intention, not prohibit such a thing, but all that it does prohibit is the use of the decision for the purpose of substantiating and establishing the plaintiff's claim. I agree to the order proposed.

G.P./R.K.

*Decree amended.***A. I. R. 1920 Bombay 139**

MACLEOD, C. J. AND HEATON, J.
Motilal Dayabhai—Appellant.

v.

Harilal Magunlal—Respondent.

First Appeal No. 112 of 1918, Decided on 10th December 1919, from decision of Additional First Class Sub-Judge, Ahmedabad, in Original Suit No. 49 of 1916.

Pre-emption—Custom of, exists in Ahmedabad.

Amongst Hindus in Ahmedabad a custom of pre-emption exists. [P 139 C 2]

B. J. Desai, K. H. Kelkar and M. T. Telivala—for Appellant.

Jinnah and G. N. Thakor — for Respondent.

Judgment.— The plaintiffs sued to enforce their right of pre-emption in respect of the plaint house which is situated in Ahmedabad. An issue was raised whether the custom entitling a neighbour to pre-empt which was set up in the plaint was proved. The learned Judge found that it had been proved and passed a decree for pre-emption. The learned Judge has referred to a number of decisions both of this Court and of the Courts at Ahmedabad, the earliest case being that of *Umbaram v. Roghounath* (1). With regard to all these decisions it may be remarked generally that it does not seem to have been ever disputed that the custom did not exist. The cases seem all to have been heard and decided on the basis that the custom did exist, the only dispute between the parties being as to whether on the facts of each case there was a right to pre-empt and whether the proper ceremonies had been performed. Such being the case, as we have no evidence on the record adduced by the appellant to the contrary it seems clear that for very many years it has been accepted as a fact in Ahmedabad that, amongst Hindus a custom of pre-emption exists, and it is impossible for us on the evidence in this case or rather in the absence of any evidence to the contrary to hold that the appellant is right in his contention that there is no such custom. Therefore the appeal fails. The decree of the lower Court must be upheld with costs.

G.P./R.K.

Appeal dismissed.

(1) [1878] 2 Bom. 402.

A. I. R. 1920 Bombay 140

CRUMP, J.

Abdul Karim and others—Plaintiffs.

v.

Karmali Rahimtulla and others—Defendants.

Original Suit No. 3639 of 1919, Decided on 12th March 1920.

Succession Act (10 of 1865), S. 187—Will by Khoja Mahomedan—No probate is required—Hindu Wills Act (21 of 1870).

Neither S. 187, Succession Act, nor the Hindu Wills Act is applicable to the will of a Khoja Mahomedan, and probate is not essential to the validity of such a will which stands on no other footing than a deed of gift. [P 140 C 2]

Pettigara—for Plaintiffs.*Kanga*—for Defendants.

Judgment.—This is a suit for specific performance of an agreement to sell executed on 19th August 1919, by one Bai Mariambai deceased in favour of the plaintiffs. It is only necessary to consider one of the issues originally raised as the others have been abandoned. The only point on which the parties are now at variance is contained in issue 4, viz., whether defendant is bound to take out representation to the estate of Mariambai.

The deceased lady was a Khoja and defendant is her son. He is prima facie her heir as the property was admittedly her stridhan if indeed that term is strictly applicable. Further there is a document purporting to be the last will and testament of Mariambai, whereby defendant is sole legatee. The question is whether plaintiffs can call upon him to take out probate of this will.

Plaintiffs say that there is a granddaughter who might, in certain circumstances be entitled to succeed if there was an intestacy. Whether those circumstances exist or not they do not know but upon the existence or non-existence of those circumstances depends the answer to the question whether the property is Yautaka or Ayautaka stridhan. Therefore their title is not safe unless the will is admitted to probate.

The defendant's answer put shortly is twofold. First, that defendant as representative of Mariambai cannot be called upon to make good any title but that of Mariambai. Secondly, that as there is no statutory obligation on him to take out probate he cannot be compelled to do so and that plaintiffs ought

to be satisfied with proof of the will which he is willing to offer.

The first objection cannot prevail. Defendant ex-hypothesi represents the estate. He is bound by the agreement to sell and he is also bound by the condition in the agreement to deduce a marketable title. His position is that he is the legal representative of Mariambai and he is bound to make that position good. The point is practically covered by S. 27, Specific Relief Act.

As to the second question it is necessary to decide whether S. 187, Succession Act, is applicable. If so then the right of the defendant to convey the property cannot be established without probate. The point is covered by authority: *Haji Mahomed Mitha v. Musai Esaji* (1). If on the other hand S. 187, Succession Act, is not applicable title under the will can be established without probate and the will therefore stands on the same footing as any other document of title. Generally speaking the section is not applicable to the wills of Mahomedans: *Shaik Moosa v. Shaik Essa* (2), and *Sakina Bibee v. Mahomed* (3). Nor indeed as explained in the former of these cases to any wills to which the Hindu Wills Act, 1870, is not applicable: see p. 254 of the report. The question really narrows itself to this:

"Whether the Hindu Wills Act, 1870, is applicable to the will of a Khoja Mahomedan."

The general question whether the wills of Khojas are governed by Hindu or Mahomedan Law, mooted in *Hasanali v. Popatlal* (4), does not arise for the purposes of the present case. Whatever may be the law applicable to Khojas in testamentary matters it cannot be contended that they are Hindus. Therefore they are not within the scope of the Hindu Wills Act, 1870.

It follows therefore that probate not being essential to the validity of the will it stands on no other footing than a deed of gift and if it is on the face of it a valid document plaintiffs must in my opinion be satisfied with proof such as is offered showing that it was executed by Mariambai under such circumstances as to make it a valid testament.

(1) [1891] 15 Bom. 657.

(2) [1884] 8 Bom. 241.

(3) [1910] 37 Cal. 839=8 I. C. 655.

(4) [1913] 37 Bom. 211=17 I. C. 17.

any instrument. On that proof being recorded further orders will be passed.

(The rest of the judgment is not essential for the purposes of report.—Ed.)

G.P./R.K.

Suit decreed.

A. I. R. 1920 Bombay 141 (1)

MACLEOD, C. J. and HEATON, J.

Bai Rami—Applicant.

v.

Jaga Dullabh and others—Opponents.

Civil Appln. No. 105 of 1919, Decided on 5th December 1919, from order of Sub-Judge, Bulsar, in Suit No. 308 of 1918.

Civil P. C. (5 of 1908), S. 115—Scope of—Interlocutory orders not barring further progress of suit are not revisable.

An interlocutory order, whether it is right or whether it is wrong, which does not prevent the further progress of the suit, is not open to revision by the High Court under S. 115. The power of the Court under that section is limited to a decided case in which no appeal lies.

[P 141 C 1]

M. K. Thakore—for Applicant.

G. N. Thakor—for Opponents.

Macleod, C. J.—This is an application by defendant 6 in the suit asking us to exercise our powers under S. 115, Civil P. C. The facts are shown in the judgment of the Subordinate Judge, dated 25th January 1919:

"The applicant was served with summons on 3rd August 1918; she had to be present on 18th October; she remained absent on the said date as well as on two following dates, namely, 8th November and 12th December. On 10th January she presented this application praying the Court to set aside the order to proceed with the suit ex-parte against her passed on 18th October."

The Judge said:

"The application was opposed by the plaintiff; after carefully considering applicant's affidavit I am not satisfied that she was justified in being absent for about more than five months after she was served with a summons. Conceding that she was ill on 18th October, she ought to have moved the Court as soon as she was cured; not having chosen to do so, she is not entitled to any indulgence in the matter, and so I reject her application with costs."

That was an interlocutory order which, whether it was right or whether it was wrong, does not decide the case. Under S. 115 the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. We have therefore no power to call for the record of any case which is under trial by a Court subordinate to the High Court. It seems neces-

sary to point out that an application like this, made during the course of a trial asking the Court to exercise its powers under S. 115 in the matter of interlocutory orders, cannot be countenanced. If such applications are made in future they should not be admitted. The rule is discharged with costs.

Heaton, J.—I entirely agree. It seems to me that if there is one kind of case which S. 115 most emphatically points to as not falling within its terms, it is a case like the present, where there is an interlocutory order on an incidental matter which does not prevent the further progress of the suit. How that can be brought within the words "a decided case in which no appeal lies," I myself am unable to understand.

G.P./R.K.

Rule discharged.

A. I. R. 1920 Bombay 141 (2)

MACLEOD, C. J. AND HEATON, J.

Maneklal Motilal—Defendant—Appellant.

v.

Mohanlal Narotamdas—Plaintiff—Respondent.

Second Appeal No. 518 of 1918, Decided on 14th November 1919, from decision of Dist. Judge, Ahmedabad, in Appeal No. 518 of 1915.

Easements—Privacy—Invasion of privacy is actionable wrong in Gujarat—Neighbour cannot be allowed to construct so as to enable him to overlook.

In the Province of Gujarat there is a customary usage which makes an invasion of privacy an actionable wrong; and a man may not therefore open new doors or windows in his house, or make any new apertures or enlarge old ones, in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation.

[P 142 C.1]

G. N. Thakor—for Appellant.

H. V. Divatia—for Respondent.

Macleod, C. J.—In this case the plaintiff sued for several injunctions against the defendant, his neighbour. He succeeded in getting an injunction from the District Judge, restraining the defendant from invading the privacy of his bedroom by opening a window in the additional storeys erected by him. The Judge has found as a matter of fact that the privacy of the plaintiff was not invaded directly before the house of the defendant was raised, and he has given effect to the decisions of this Court which have held that in the Province of

Gujarat there is a customary usage which makes invasion of privacy an actionable wrong, and that a man may not open new doors or windows in his house, or make any new apertures, or enlarge old ones, in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation. That is laid down in *Manishankar Hargovan v. Trikam Narsi* (1). The Court said:

"A series of decisions extending over a long number of years, and commencing with 1 Bom. 272, has settled this question."

Those decisions must no doubt have been founded on evidence, at any rate we must presume that, and as the case cited has never been overruled, in second appeal it is impossible for us to say that the decision on a question of fact was wrong. Therefore in the Province of Gujarat this customary right of privacy must be taken to have been proved. The only ground upon which it may be argued that the decision of the learned District Judge was wrong was that the plaintiff before the defendant altered his building had no privacy for this particular room. For if already there was a window in the defendant's house which looked directly into the plaintiff's bedroom, it would make no difference if more windows were added which also overlooked the plaintiff's room. But the learned Judge has found as a fact that the plaintiff had a right of privacy for this particular room, and that right of privacy was not affected by the fact that a man with a flexible neck standing on the defendant's agashi (which did not actually belong to the house in dispute) might be able to crane over and thus see a portion of the plaintiff's bedroom. That as the learned Judge remarked would be a positive act of spying. I do not think that it could be said that the plaintiff has not acquired a right of privacy for his bedroom, merely because a person by doing something, which he ought not to do, might be able to look into a portion of it. In my opinion therefore the decision of the learned District Judge was right. The appeal should be dismissed with costs.

Heaton, J.—I agree. It was argued that the somewhat peculiar exception to the general law which has been applied to the Province of Gujarat really ought

not to be applied. We have an instance of it in the case of *Manishankar Hargovan v. Trikam Narsi* (1) and it is now too well-recognised to be successfully disputed. It is not contended in this case that the person aggrieved belongs to a class who do not by custom obtain the benefit of this law as to privacy. It may be there are people on whom this peculiar custom confers benefit, and others who do not take that benefit. But no point of that kind is raised here. Therefore we have to accept first of all that the rule as to privacy applies in this neighbourhood; and secondly, that it applies to the plaintiff. That being so, the questions whether his privacy was real before the present additions to the defendant's house, and whether that privacy is now invaded by reason of those additions, are both purely questions of fact. They are not and cannot as far as I can see, be questions of law. The Judge below has found on those questions of fact. He is right in his application of the law, and I think his decision must be affirmed and the appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 142

MACLEOD, C. J. AND HEATON, J.

Kisandas Laxmandas Bairagi and another—Plaintiffs—Appellants.

v.

Dhondu Tukaram Narvade and another—Defendants—Respondents.

Second Appeal No. 240 of 1918, Decided on 27th November 1919, from decision of Dist. Judge, Ahmednagar, in Appeal No. 200 of 1916.

Contract Act (9 of 1872), Ss. 23 and 24—Past cohabitation is no consideration for transfer.

A transfer of property in favour of a mistress the real consideration for the transaction being past cohabitation is void because past cohabitation is not good consideration for a transfer of property. [P 143 C 1]

V. D. Kamat—for Appellants.

P. B. Shingne—for Respondents.

Judgment.—The plaintiffs sued for possession of a house as owners, alleging a sale for Rs. 100 to plaintiff 2 by defendant 1. The trial Court found that there was no money consideration for the sale and that as plaintiff 2 had been the mistress of defendant 1, the real consideration for the transaction was past cohabitation. That was not the case

(1) [1868-69] 5 B. H. C. R. (A. C. J.) 42.

made out in the plaint and if, as we are told the point had never been decided in this Court, we are decidedly of opinion now that past cohabitation will not be good consideration for the transfer of property. The facts of this case go even further, because it was not merely the case of plaintiff 2 being the mistress of defendant 1, but of the connexion between the two being adulterous as plaintiff 2 had a husband living. Therefore, it comes to this: that the transaction was really a gift, and as the property was joint family property between the defendants and there had been no partition the fact that defendant 1 purported to sell half the house would not thereby effect a partition. Therefore, whichever way we look at it, the plaintiff must fail and the appeal is dismissed with costs.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1920 Bombay 143**

MACLEOD, C. J. AND CRUMP, J.

Ganpatrao Appaji Jagtap—Plaintiff—Appellant.

v.

Bapu Tukaram—Defendant—Respondent.

Second Appeal No. 711 of 1918, Decided on 18th December 1919, from decision of Joint Judge, Poona, in Appeal No. 44 of 1914.

(a) Deed—Variation—Deed duly executed and registered cannot be altered by any subsequent endorsement.

A party who has put his signature to a document which is clearly a sale deed cannot alter the nature of that document by writing on it when the document is registered that it means something else than it really appears to be.

[P 144 C 1]

(b) Evidence Act (1 of 1872), S. 92 (6)—when extrinsic evidence is not allowable stated.

Where a document itself is a perfectly plain, straightforward document no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. It is only where the terms of a document itself require explanation that evidence can be led within the restrictions laid down by Prov. 6, to S. 92.

[P 145 C 1]

G. S. Rao and B. K. Mehendale—for Appellant.*Jinnah and S. R. Bakhale*—for Respondent.

Judgment.—The plaintiff brought this suit to redeem the plaint land which had been mortgaged to the father of defendant 1 by three brothers, Balvantrao, Namdeo and Tatyā, by a deed of mortgage

for Rs. 700 on 8th August 1865. One Ramji purported to buy the equity of redemption by a sale deed in 1867, and the present plaintiff is an assignee from Ramji. After the three brothers had executed the deed in favour of Ramji in 1867, two of them, Tatyā and Namdeo, purported to sell to two persons, Savlyā and Pandu, their right in the equity of redemption, and thereafter, in execution of a decree against Balvantrao, his right in the equity of redemption was put up for sale and bought by defendant 1. Defendant 1 also alleges that as Savlyā and Pandu filed a redemption suit, and after getting a decree for redemption failed to redeem the property, their right to redeem was barred, and therefore defendant 1 became entitled absolutely to the mortgaged property.

The proceedings have gone through various phases in the lower Courts. In the trial Court the plaintiff was granted a redemption decree which appears at p. 19.

On appeal the case was remanded to the trial Court for findings on the following issues:

(1) Was the sale deed to Ramji in 1867 really a mortgage? (2) If it was a mortgage, to what relief is the plaintiff entitled?

The case on remand came before another Subordinate Judge, and he referred to the facts already recorded and came to the conclusion that what purported to be a sale to Ramji in 1867 was really a mortgage and on that finding he held that the plaintiff was entitled to recover Rs. 133-5-4 as secured on Survey No. 120 out of the plaint land.

The case then came back to the lower appellate Court again before another Judge, who dismissed the suit on the ground of limitation.

We are of opinion that both Courts have taken into consideration evidence which they ought not to have taken in construing the document of 1867, which is Ex. 71 in the case. That is clearly a sale deed looking at the language of the document. There can be no two words about that. It is difficult to see how any discussion could have arisen, and how any decision could have been arrived at and that the document on the face of it was anything else except a sale deed, and, as far as I can gather from the judgments, both Courts refer to it as a sale deed. An attempt was made by the defendant

to show that the transaction evidenced by that document was a sham transaction, but he failed entirely to prove that allegation. But the appellate Court has come to the conclusion that Ex. 71 must be read as a mortgage. The learned Judge has rightly excluded the evidence of intention. But he has admitted exactly the same evidence that would have been admitted if evidence of intention had been allowed under Prov. 6 to S. 92, Evidence Act, and he has come to the conclusion really that, when the parties executed the sale deed, they intended that it should be a mortgage transaction. The only circumstance upon which the defendants could possibly rely for their contention is the statement made by Balvantrao when acknowledging execution before the Registrar, in which he referred to the document as a sale by way of a mortgage. I cannot see myself how a party who has put his signature to a document, which is clearly a sale-deed, can alter the nature of the document by writing on it, when the document is registered, that it means something else than it really appears to be. Then the learned Judge has considered various facts with regard to the value of the property and the inadequacy of consideration, all which may be evidence that the three brothers, when they executed a sale-deed, intended that it should be a mortgage.

We think the case clearly comes within the decision in *Dattoo v. Ramchandra* (1). Sir Lawrence Jenkins, C. J., said:

"If we look to the deed alone, it is clear that the decree is correct, and that the plaintiff's father parted with his interest in the property. But it is said that the circumstances to which we have alluded require that we should draw an inference that the document is not what it appears to be. We can only understand that as meaning that the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred from these several circumstances. But it has been pointed out by the Privy Council in *Balkishen Das v. W. F. Legge* (2) that in questions of this kind the Courts in India must be guided by S. 92, Evidence Act.

The defendant has relied upon a dictum of the Privy Council in *Jhanda Singh v. Sheikh Wahid ud-din* (3), where their Lordships say:

"It was not disputed that the test in such cases is the intention of the parties to the instruments. That intention however must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances."

That is evidently a reference to Prov. 6 S. 92, Evidence Act, which states that "any fact may be proved which shows in what manner the language of a document is related to existing facts."

That is one of the provisos which is the despair of the Judge and the joy of the lawyers. It may be read in many ways. But it is not easy to see in what sort of a case this proviso would be directly applicable. If you have to look at surrounding circumstances in order to ascertain the intention of the parties which has already been clearly expressed in the deed, it seems to me it would be very easy to go over the line and attempt to prove from the surrounding circumstances that the intention of the parties was not what it appears to be. A very general statement no doubt is made by the proviso, and what their Lordships say in the passage I have just read is merely a repetition of the proviso. But on reading the whole of the judgment in that case, it seems clear that they had not applied that proviso to the facts of that case, as they merely considered the two documents before them and gave them the construction which they thought was the proper one from the consideration of what was written in the documents themselves.

We have also been referred to the decision in *Maung Kyin v. Ma Shwe La* (4). But the facts of that case are entirely different, because there the interests of a third party were involved. The head-note in 45 Cal. says:

"The language of S. 92, Evidence Act, 1872, with regard to a 'contract, grant or disposition reduced to writing' in terms applies, and applies alone, 'as between the parties to any such instrument or their representatives in interest.' Wherever, accordingly, evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case therefore the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions....In this case both the grantor and grantee in transactions by deed regarding certain land were shown by the evidence to have dealt with it with the knowledge that it belonged to a third person who was not a 'party to the deeds or a representative-in-interest of a party' to them. Held, that S. 92,

(1) [1906] 30 Bom. 119.

(2) [1900] 22 All. 149=27 I. A. 58=7 Sar. 601 (P. C.).

(3) A. I. R. 1916 P. C. 49=38 All. 570=43 I. A. 284=36 I. C. 38 (P. C.).

(4) A. I. R. 1917 P. C. 207=45 Cal. 320=44 I. A. 236=42 I. C. 642 (P. C.).

Evidence Act, was no bar to the admission of evidence to show what was the true nature of the transactions: it did not prevent fraudulent dealing with a third person's property."

In *Balkishen Das v. W. F. Legge* (2) their Lordships said:

"The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

That appears to me to show that where a document itself is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will therefore be admitted. But it can only be in such cases where the terms of the documents themselves require explanation, and then evidence can be led within the restrictions laid down by the proviso.

Then I may refer to the case of *Jhanda Singh v. Sheikh Wahid-ud-din* (3), where their Lordships, after dealing with the English cases on the subject, said:

"There is one other remark of Lord Cranworth's in *Alderson v. White* (5) which is particularly applicable to the present case. He said: 'I think a Court after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be.'"

So assuming in this case we are prepared to allow evidence to show that this document is not a sale-deed but something else; still on general principle it would certainly be extremely undesirable, after the document had stood more than 50 years, to allow evidence to be led to show that the document is not what it appears to be on the face of it, unless it be demonstrated to our complete satisfaction that the legislature entitled us to admit such evidence. The learned appellate Judge seems to have been led away by the use of the words "creditor and debtor" in Ex. 71 as showing that the position of creditor and debtor continued after the document was executed. But from the contents of the document itself it appears that part of the consideration was the amount previously due, and that accounts for those words being used. In my opinion therefore the decree of the lower appellate Court must be set aside and the original order of the trial Court

allowing the plaintiff to redeem on payment of Rs. 466-10-8, etc., must be restored. Up to 19th December 1913 the defendants are entitled to their costs. After that the plaintiff is entitled to his costs.

G.P./R.R.

Decree set aside.

A. I. R. 1920 Bombay 145

MACLEOD, C. J. AND HEATON, J.

Ahmad Asmal Muse—Appellant.

v.

Bai Bibi—Defendant—Respondent.

Second Appeal No. 604 of 1918, Decided on 18th December 1919, from decision of Dist. Judge, Broach, in Appeal No. 63 of 1914.

(a) *Bombay Bhagdari Act* (5 of 1862), S. 3—Waste—Gift of portion by life tenant constitutes waste.

A gift of a portion of the property of which the donor is a life-tenant constitutes waste unless some necessity can be set up by the person making the alienation. [P 146 C 2]

(b) *Mahomedan Law—Alienation—Widow*, by custom life tenant of bhagdari property cannot alienate for spiritual benefit of husband.

A Mahomedan widow, who according to custom is only a life tenant of the Bhagdari property which belonged to her husband, cannot make gifts of the estate as if she were in the position of a Hindu widow who is entitled to make alienations to secure spiritual benefit to her husband. [P 146 C 2]

(c) *Civil P. C.* (5 of 1908), O. 40, R. 1—Intention to transfer by widow though not amounting to waste gives sufficient reason for appointment of receiver.

The fact that a life-tenant is anxious to transfer the estate to a third person might not amount to waste, but it might constitute a danger to the interests of the reversioner which might justify a Court to protect those interests by the appointment of a Receiver. [P 146 C 2]

G. S. Rao—for Appellant.

G. N. Thakor—for Respondent.

Judgment.—This suit was originally brought at the beginning of 1913 by the plaintiff. He sued to have a declaration that he was the nearest agnate of the deceased Adam Amanji and that defendants 1 and 2 acquired no rights by his will and that therefore he the plaintiff, was entitled to the property in suit after the death of defendant 1. Admittedly the property in suit is bhagdari property and comes within the provisions of the Bhagdari Act.

The trial Court on 15th October 1914 passed the following order:

"Declared that the plaintiff is the nearest agnate of the deceased Adam and is entitled to succeed to his bhag property in suit after the death of defendant 1. Declared that the will

(5) [1858] 2 De G. & J. 97=4 Jur. (n. s.) 125=6 W. R. 242=44 E. R. 924=119 R. R. 88.

of the deceased Adam is inoperative in so far as the bhag property in suit is concerned and defendant 2 does not acquire any right to the said property under the said will against the plaintiff. Plaintiff's prayer for the appointment of a Receiver is rejected."

An appeal was filed against that order and the suit was dismissed with costs throughout on the plaintiff by the learned District Judge. On the question whether or not the will of Adam was invalid under Mahomedan Law, the learned Judge held that the Will was not invalid and further that the plaintiff was not entitled to impugn it. He therefore did not deal with the question whether the plaintiff was entitled to the appointment of a receiver.

An appeal was filed in the High Court and that decree of the learned appellate Judge was set aside, and the case was remanded for disposal upon the other question discussed in the trial Court. The learned Judges said:

"If there has been waste or there is danger to the estate established, a possible reversionary heir may come in and ask for relief. There are cases of waste alleged and there is danger of transfer to defendant 2 suggested."

The case therefore went back to the District Judge, and he was of opinion that as no waste had been established and as no transfer of any lands to defendant 2 was proved, there was no necessity to appoint a Receiver. In spite of the findings of the High Court he dismissed the plaintiff's suit with costs throughout. That in any case was a decree which cannot for a moment be supported. Clearly the plaintiff was entitled to have the order of the trial Court restored with regard to the first two declarations, that he was the nearest agnate of the deceased Adam and that the will of the deceased Adam was inoperative. Now it is admitted on the question of waste that defendant 1 had given away two survey numbers on a demand by the panch after the death of her husband, and defendant 1 alleged that her husband agreed orally to give this property to the Masjid. There was no provision in the will about giving any land to the Masjid, and so we have this to consider, the widow made a gift of these two lands to the Masjid when she was only entitled to a life interest in the bhagdari property. It is quite true that nothing was said about the provisions of S. 3, Bhagdari Act, and the question whether this alienation is valid or invalid under S. 3 would depend

upon whether these two survey numbers constitute a recognized subdivision of a bhag. It seems to me pretty obvious that they cannot possibly do so.

But apart from that we have to consider whether the gift of a portion of the property of which the donor is a life tenant constitutes waste. On general principles it certainly must be considered waste unless some necessity can be set up by the person making the alienation. That is not suggested in this case. But the authority of *Khub Lal Singh v. Ajodhya Misser* (1) has been dragged in on the false analogy that a Mahomedan widow, who according to custom is only a life tenant of the bhagdari property which belonged to her husband, can on that account make gifts of the estate as if she were in the position of a Hindu widow who is entitled to make alienations to secure spiritual benefit to her husband. That is an absolutely false argument, and it shows the necessity of exercising great care when one is considering the succession to the estate of a Mahomedan when it appears to be governed by a particular law as regards the property concerned. It is only because there is a particular custom with regard to the succession of bhagdari property that defendant 1 has a life interest with remainder to the reversioner instead of having a widow's share in her husband's property. But by no process of reasoning can you come to the conclusion that on that account she is for all intents and purposes exactly in the position of a Hindu widow.

There is also evidence that defendant 1 was anxious to get the lands transferred to the name of defendant 2. That by itself might not constitute waste, but it might constitute a danger to the interests of the reversioner which a Court might take into consideration on the question whether his interests should be protected. Considering the attitude of the defendants, and the fact that they are probably collecting the rents of the property through some agency, there is no reason why the Court should not protect the interests of the plaintiff by appointing a Receiver. The decree of the lower appellate Court will be set aside. There will be the two declarations as ordered by the trial Court on 15th October 1914, and the case will be remanded to the

(1) [1916] 43 Cal. 574 = 31 I. C. 433.

trial Court for the appointment of a Receiver. The costs up to the remand order of the High Court were due to the fact that the testator had made a will, and whether it was valid or invalid in the circumstances of the case was a question which required to be decided by the Courts. Therefore, following the ordinary rule, costs must come out of the estate up to the date of the remand order. But the costs after the remand order dealt purely with the question of waste and must be paid by the defendants.

G.P./R.K.

Order set aside.

A. I. R. 1920 Bombay 147

SHAH AND HAYWARD, JJ.

Mahmadsaheb Appalal Kaji—Appellant.

v.

Secy. of State and another—Respondents.

Second Appeal No. 922 of 1917, Decided on 1st August 1919, from decision of Dist. Judge, Belgaum, in Appeal No. 264 of 1916.

Bombay Revenue Jurisdiction Act (10 of 1876), S. 4 (k)—Civil Court's jurisdiction in suit for title to kaji inam based on Inam Commissioner's order and for declaration of illegality of order to pay rent for inam land is not barred.

A suit by the holder of a kaji inam, based upon a decision of the Assistant Inam Commissioner under the Bombay Titles to Rent-free Estates Act, 1852, for a declaration that an order of the Collector, that the plaintiff should pay certain rent in respect of the inam lands or that the lands should be forfeited is illegal and ultra vires, is cognizable by a civil Court under S. 4-k, Bombay Revenue Jurisdiction Act, and the circumstance that the plaintiff is an alien from the original grantee does not take the suit out of the provisions of the clause. [P 148 C 1]

A. G. Desai—for Appellant.

G. S. Rao and J. G. Rele—for Respondents.

Shah, J.—The plaintiff in this case sues for a declaration that the order of the Collector, dated 2nd June 1914, directing that he should pay certain rent on the lands in question or that the lands should be forfeited, is illegal and ultra vires.

Defendant 1 (the Secy. of State for India in Council) and defendants 2 and 3 in whose favour the said order was made contended in the trial Court that the jurisdiction of the civil Courts was ousted by S. 4 (a), Bombay Revenue Jurisdiction Act (10 of 1876) and that the order was

justified by the rules framed by the Government in 1908 in exercise of the powers conferred by Ss. 8 and 10, Bombay Act 11 of 1852, and Act 7 of 1863, S. 2, Cl. (3), regarding the resumption and continuance of service lands.

The trial Court held that the jurisdiction of the civil Court was not ousted, that the rules did not justify the order of the Collector, and that he was entitled only to levy the full assessment. It accordingly declared that the Collector was not entitled to recover from the plaintiff any sum exceeding the full assessment of the lands in suit and ordered a refund of the sum recovered in excess of the full assessment in pursuance of the Collector's order.

Defendant 1 acquiesced in this view before the lower appellate Court; and the contentions raised by defendant 3 as to the validity of the rules in relation to the service lands in question and as to jurisdiction under S. 4 (a), para. 3, were disallowed by the lower appellate Court. In the result the decree of the trial Court was confirmed.

In the appeal before us defendant 1 has not raised any objection to the decree appealed from. On behalf of defendant 3, who is the appellant here, it is urged that the jurisdiction of the civil Courts is ousted under S. 4 (a), para. 1. The points raised in the lower appellate Court have not been urged before us on his behalf; and it is not suggested now that the Collector's order is justified beyond the extent recognized by the lower Courts or that the jurisdiction of the civil Courts is ousted under S. 4 (a), para. 3. On behalf of the plaintiff, no objection is taken to the decree so far as it allows the levy of full assessment against him. Thus in this appeal we are not concerned with the merits of the decree passed by the lower Courts, but only with the question of jurisdiction raised by defendant 3.

It is urged that the claim relates to property appertaining to the hereditary office of a kazi, which is one of the offices expressly recognized under Act 11 of 1852, Sch. B, R. 8, para. 1, or which is the office of a village officer within the meaning of S. 4 (a), para. 1, and that no civil Court can exercise jurisdiction in relation thereto. But the provision relied upon is subject to the exceptions appearing in the same section. As indicated by the proviso clause (k), if any person claim to hold

property wholly or partially exempt from payment of land revenue under an adjudication duly passed by a competent officer under Act 11 of 1852 which declares the particular property in dispute to be exempt, such claim shall be cognizable by civil Courts. In the present case the plaintiff relies upon a decision of the Assistant Inam Commissioner, dated 31st December 1852, and claims in effect that the land in question is wholly exempt from assessment. The sanad subsequently granted in 1867 is only a formal expression of that decision. Thus the plaintiff's claim is clearly within the scope of the proviso and cognizable by civil Courts.

It may be that on the merits he may not be able to substantiate his claim fully or at all; but that does not affect the jurisdiction to consider his claim to hold the land wholly free under the decision of the Inam Commissioner.

It is contended however that the plaintiff claims as an alienee and not under the person upon whom the inam was conferred under the decision of the Inam Commissioner and that the exception cannot apply to him. The proviso in terms applies to any person claiming exemption from land revenue under an adjudication duly passed by a competent officer under Act 11 of 1852. I do not see how an alienee can be treated as being outside the scope of the provision. Further the decision of the Inam Commissioner expressly saves the rights of other persons, whose names may not appear in the decision, and it is made clear that the decision should be taken to mean how long the land is to be continued free from assessment.

In this view of the matter it is not necessary to consider the effect of S. 5(a), which has been relied upon by the plaintiff as saving the jurisdiction of the civil Courts in a suit like the present. The plaintiff's contention is that his suit is against Government to contest the amount claimed and recovered as land revenue on the ground that such amount is in excess of the amount authorized in that behalf by Government. He further contends that the amount claimed and recovered under the Collector's order is land revenue within the meaning of the Bombay Revenue Jurisdiction Act, and that it is in excess of the amount authorized by Government under Act 11 of 1852 or under the sanad. On the other

side it is contended that the amount must be deemed to have been authorized under the rules framed by the Government in 1908 and that S. 5(a) cannot save the jurisdiction of the civil Courts. The plaintiff's contention is not without force. But as I have said, it is not necessary to decide this question. The only point raised on behalf of the appellant as to the jurisdiction of the Court fails.

The question relating to the meaning of "resumption" of an inam under Act 11 of 1852 in respect of service lands pertaining to any hereditary office useful to the village community as distinguished from the State has been incidentally argued. But it does not affect the point of jurisdiction in any way. It is really a point touching the merits of the Collector's order; and neither party has objected to the decree under appeal on merits. It is not therefore necessary to express any opinion about it.

The result is that this appeal is dismissed and the decree of the lower appellate Court confirmed.

The appellant to pay the costs of respondent 2. Respondent 1 to bear his own costs.

Hayward, J.—I agree.

G.P./R.K.

Decree confirmed.

A. I. R. 1920 Bombay 148

MACLEOD, C. J. AND HEATON, J.

Bhai Mahadu Toraskar and others—
Defendants—Appellants.

v.

Vithal Dattatraya Pendharkar—Plaintiff—Respondent.

Second Appeal No. 299 of 1918, Decided on 2nd December 1919, from decision of Dist. Judge, Satara, in Appeal No. 88 of 1916.

Landlord and Tenant—Agricultural land—House ancillary to agriculture by tenant of agricultural land cannot be removed.

A tenant of agricultural land is entitled to build a dwelling house on a portion of his land for his own residence and in such a way as to facilitate his agricultural work. A suit therefore by a landlord for the removal of such a building is not maintainable. [P 149 C 1, 2]

K. N. Koyajee—for Appellants.

S. R. Bakhale—for Respondent.

Macleod, C. J.—The plaintiff sued to get a declaration that the property in suit belonged to him, and that the defendants had no right to build on it, and prayed that the defendants might be ordered to remove their buildings on the suit property, and in default he might be

allowed to remove the same. An issue was raised whether the defendants proved that they were mirasi tenants, and that was found in their favour. But the Judge came to the conclusion that they had no right to build on the plaintiff's ground, and gave the plaintiff the decree he had asked for.

In appeal the learned appellate Judge came to the conclusion that whether the defendants were mirasi tenants or permanent tenants or annual tenants the question with regard to the buildings was the same. He certainly pointed out that what the learned Judge in the trial Court really meant was that the defendants had become permanent tenants of the land under the presumption arising from S. 83 of the Bombay Land Revenue Code and such permanent tenants are not mirasdaars. But he confirmed the decree of the lower Court apparently on the ground that the defendants as tenants could not erect the building in question. That depends entirely upon the nature of the building, and both Courts apparently looked upon the nature of this particular building from the wrong point of view, and without proper reference to the previous history of the suit. On the land there was previously a thatched hut or ohhappar. There were also kuchha huts which were put up by the predecessor of the defendants for the better cultivation of the land. The defendants pulled down the thatched hut or ohhappar, and erected a new building on the site and also on a few feet of additional ground. No plan of this building was put in, but the evidence shows that the new building of stone, brick and mortar had a central courtyard and two pucca verandahs. The Judge came to the conclusion that it was far too ambitious to be used solely for storing implements, tethering cattle and other purely agricultural purposes; and judging from the standard prevailing in this part of the country it was probably meant as a dwelling house. Then he considered that the law seems to have been well settled that no tenant in this country is at liberty to erect a dwelling house upon agricultural holdings for other than agricultural purposes and thereby to alter the character of the holding.

That may be perfectly correct. But a tenant might well be allowed to erect a building on his holding in order that he may live there himself, and that is cer-

tainly the law in England, and I cannot see, if the defendants in this case pulled down the ohhappar or hut and utilized the space and a small additional space for buildings where they themselves would live when they wanted to be on the land for cultivation purposes, that it was contrary either to the provisions of the Transfer of Property Act, which could only be applied by analogy, or to any other law that I am aware of.

The head-note of the case of *Ramadhan v. Zamindar of Ramnad* (1) shows that the Zamindar sued for an injunction to compel the defendant who held agricultural lands comprised in the Zamindari with occupancy rights, to demolish a dwelling house which he had erected thereon for purposes not connected with agriculture.

Apart from that the customs of the country may vary in different districts. It may be the custom in one district that the agriculturists should all live in the villages and that no building could be erected in the land. In other districts it may be the custom for agriculturists to erect buildings on the land in order that they may stop there during the cultivating season. That is what has happened in this case. The only ground on which the judgment can be supported would be that this building was of such a substantial character that it was far too good to be used for agricultural purposes. But that is not the question. If it is put up for agricultural purposes it does not matter how much the builder had spent on it. The plaintiff has not been able to show that this building erected on the old site could not possibly be used, and would not be used, for agricultural purposes, and he would have to prove that before he could possibly succeed. In my opinion the order of the lower appellate Court was wrong. The appeal must be allowed and the suit dismissed with costs throughout.

Heaton, J.—I also think the suit must be dismissed with costs throughout. After reading both the judgments of the Courts below I find myself unable to understand why the claim was allowed. It seems that the plaintiff is the landlord and the defendant is his tenant and according to the assumption of the first Appellate Court, which we must accept at least for the purposes of the argument, the defendant is a permanent tenant. He is not

(1) [1893] 16 Mad. 407.

a mirasdar in the sense of a person who possesses the occupancy rights. He is only a tenant, though a permanent one, and he is an agricultural tenant. He had huts on the land. He has replaced those huts by a substantial permanent structure which covers apparently very much the same area that was covered by the former huts including the small intervals between them. But I understand from the judgments or from the actual measurements given in the judgment of the lower appellate Court that this substantial building does not cover an area so large that it would justify anyone in saying that it was there not for agricultural purposes, but for some other purpose. Nevertheless the Courts came to the conclusion that plaintiff, the landlord is entitled to have this permanent structure removed because, so far as I can make out, it is a dwelling house. It is too good to be merely a place for housing cattle, keeping agricultural implements and so forth. But for a man to build a dwelling house on land which he cultivates is not contrary to any agricultural purpose.

As a matter of fact agriculture, speaking generally, is facilitated by residence on or very near to the land which is cultivated. It can be better conducted by a farmer who lives in that way than by one who lives at a considerable distance away in the village site. It is not shown in the judgments, it is not even suggested, that this substantial structure which the defendant put up was put up, not in order that he might live there and conduct his agricultural work from there but for some other purposes of profit. So the impression remains, whether it was intended or not, that both the Judges in the Courts below have decided that the plaintiff's right to remove the structure arises from the circumstance that it is a dwelling house and not a shed. It seems to me that to hold that for a farmer to build a dwelling house on a portion of his agricultural land for his own residence, and in such a way as to facilitate his agricultural work, is necessarily contrary to the intention of an agricultural tenancy, is to come to a very remarkable and an unreasonable decision. I am unable therefore to find that the orders made by the lower Courts follow from the facts which they have found, and I think that this appeal as proposed must

succeed and that the suit must be dismissed with costs.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 150

SHAH AND HAYWARD, JJ.

Fakhrodinsab Mahomed Arifsab —
Plaintiff—Appellant.

v.

Secy. of State—Respondent.

First Appeal No. 13 of 1916, Decided on 1st August 1919, from decision of Dist. Judge, Dharwar, in Suit No. 3 of 1914.

Bombay Revenue Jurisdiction Act (10 of 1876), S. 4 (k)—Claim based on adjudication by Inam Commissioner—Suit even by alienee for declaration of title to khatibki inam and for injunction restraining Collector from recovering assessment is not barred by S. 4.

A suit against the Government for a declaration that the plaintiff is the full owner of a khatibki inam and of the khatibgiri rights appertaining to it, and for an injunction restraining the Collector from recovering the full assessment from him, the claim being based on an adjudication made by the Inam Commissioner under the Bombay Titles to Rent-free Estates Act of 1852, is cognizable by the civil Courts under S. 4 (k), Bombay Revenue Jurisdiction Act, and the circumstance that the plaintiff claims as alienee from the original khatib does not take the suit out of the clause.
[P 151 O 2]

G. S. Mulgaonkar, A. G. Desai and M. H. Vakil—for Appellants.

Coyajee and S. S. Patkar—for Respondent.

Shah, J.—The plaintiff sues for a declaration that he is the full owner of the lands in suit and of the khatibgiri right appertaining to them, for an injunction prohibiting the defendants from recovering Rs. 450, annually from him and for a refund of Rs. 750 recovered by the defendants.

It is alleged that Fakrudin valad Mohamed Kasimsaheb was originally the khatib in Hangal and that as such he held certain lands in inam. These lands were allowed to remain with him in 1856 by the Inam Commissioner under Act 11 of 1852. Under circumstances detailed in the plaint the lands and the khatibgiri came to be alienated to the plaintiff's father in 1864 by Fakrudin's daughter-in-law, Pachhabi. Thereafter the plaintiff claims to have enjoyed the lands free from assessment and performed the services as khatib until the Commissioner (Southern Division) made an order on 23rd September 1914, directing that the full economic rent be re-

covered from the present plaintiff and be paid to Mahomed Hanif (defendant 3) as long as he officiated as khatib on behalf of the inamdar. The Commissioner made this order under the rules framed by the Government in 1908 under Act 11 of 1852 and Bombay Act 7 of 1863, S. 2, Cl. (3), and their general powers. The plaintiff now claims reliefs in this suit on the footing that the said order of the Commissioner is invalid and not binding upon him and that the alienation in favour of his father is good. The plaintiff also claims as an heir to Pachhabi.

It is not necessary to note all the defences, which may be gathered from the several issues framed by the lower Court. Three issues out of them were taken up as preliminary issues. Two out of these three issues were dropped as having been unnecessarily framed. The only preliminary issue considered and decided by the lower Court relates to the jurisdiction of the Court to entertain the suit. The lower Court held that the suit was barred by S. 4 (a), Bombay Revenue Jurisdiction Act, and accordingly dismissed the suit. The plaintiff has appealed to this Court and has urged in support of the appeal that the jurisdiction of the civil Courts is not ousted by S. 4 (a) and that the suit is covered by the exception indicated in the proviso Cl. (k), S. 4, and is also saved by S. 5 (a) and (b). On behalf of the defendants it has been contended that the jurisdiction of the Courts is ousted under paras. 1, 2 and 4, S. 4 (a) and that Cl. (k) does not apply as the plaintiff is only an alienee, and further that the claim relating to the khatibgiri service is not covered by the proviso. Further it is contended that S. 5 (a) does not apply as the amount ordered by the Commissioner to be recovered as the economic rent is really the amount authorized by the Government and that therefore there is no excess such as is contemplated in part 1, S. 5 (a). S. 5 (b), it is urged, cannot apply to the present suit, as it relates not merely to a claim between private parties but to a claim against Government.

In the present case there can be no doubt that in 1856 the lands in question were continued as the permanent official emolument of the hereditary office of a khatib in inam under the decision of the Inam Commissioner. The office of

khatib, though not expressly mentioned in Act 11 of 1852, Sch. B, R. 8, Cl. 1, is one of the type contemplated by that clause and not by the fifth provision of that rule. The plaintiff no doubt claims the right to officiate as a khatib, but his suit in substance is to establish his right to hold the land free from assessment. It is common ground that the Hereditary Offices Act (3 of 1874) does not apply to this office. The fact that the Commissioner has acted under the rules framed by the Government under Act 11 of 1852 also confirms the view that Act 3 of 1874 has no application. The claim may be treated as relating to property appertaining to the hereditary office of khatib recognized under Act 11 of 1852 under para. 1 or in part as a claim to perform the duties of the office under para. 2 or as relating to lands declared by Government or any officer duly authorized in that behalf to be held for service under the last paragraph of S. 4 (a), Act 10 of 1876. These provisions are however subject to the exceptions mentioned in the section. The plaintiff's claim to hold the land wholly or partially free from payment of land revenue under an adjudication duly passed by a competent officer under Act 11 of 1852 is cognizable in the civil Courts under Cl. (k) of the proviso to the same section. I do not think that the circumstance that he claims as an alienee takes the case out of the proviso. It is not necessary to consider the further argument based on S. 5 (a), though I am by no means satisfied that the present suit is not saved under that clause so far as it seeks to get rid of the order of the Commissioner as to the economic rent. The case is very similar to the second appeal which we have just decided, and the point of jurisdiction here must be decided in the same way.

The claim to perform the service as Khatib, apart from the claim to hold the lands exempt from the payment of land revenue, stands on a somewhat different footing. That claim is covered in form by part 1, para. 2, S. 4 (a) and may be in form not cognizable by the civil Court ; but in substance that part of the claim is a matter between private parties. The suit is no doubt against Government and properly so as regards the other reliefs. But this relief by itself could well be treated as falling under S. 5 (b).

Besides it is a prayer of secondary importance in the suit, the principal thing being the claim as to lands being exempt from the payment of land revenue. It may be that on the merits, as to which I express no opinion, the plaintiff may fail to establish that he is entitled to officiate as a khatib, but the claim is cognizable by civil Courts.

Several other questions have been argued in this appeal as bearing on the question of jurisdiction. But they are all questions which may affect the merits of the plaintiff's claim and will have to be considered by the lower Court when it comes to deal with the case on the merits. For instance it has been argued that the rules of 1908 under which the Commissioner has acted are not justified by Act 11 of 1852, Sch. B, R. 8, Cl. 5, so far as they are sought to be made applicable to an hereditary office, not falling under the said Cl. 5. It is further argued that the sanad relating to the land shows that the land is inalienable and that what is granted is land and that what can be resumed is the land and not merely the assessment, and further that the Government have the right to determine as to who shall perform the service of khatib. It is also argued that whatever may be the powers of Government with regard to the office, they can only resume what they granted in inam under Act 11 of 1852, that is, they may levy full assessment, but they cannot resume the possession of the lands nor can they levy the full economic rent. But these are all questions which touch the merits of the case and do not affect in any way the point with which we are concerned at present.

I would therefore reverse the decree of the lower Court and remand the suit to that Court for disposal according to law.

Costs up to date to be costs in the suit. Two sets of costs for respondents (one for respondent 1 and the other for respondents 2 and 3).

Hayward, J.—I agree

G.P./R.K.

Decree reversed.

A. I. R. 1920 Bombay 152

PRATT, J.

Husseinbhai Cassimbhai—Plaintiff.

v.

Advocate-General of Bombay and others—Defendants.

Original Suit No. 2835 of 1920, Decided on 14th February 1920.

Mahomedan Law—Wakf—Some heirs surrendering interest over portion—Another heir accepting and covenanting to spend one-fourth of it in charity—Transfer held valid—Other became owner and his declaration held created valid wakf.

Some of the heirs of a deceased Mahomedan relinquished all claims to a certain portion of the estate of the deceased and L, another coheir of the deceased, covenanted that that portion should become her property absolutely and further that she would spend one-fourth of the same in charity and for the spiritual benefit of the deceased: she also constituted and declared herself a trustee of the said one-fourth for the said purposes.

Held: (1) that the surrender of the coheirs in favour of L and L's covenant to become owner transferred the entire dominion of the property to L;

(2) that the surrender and the covenant were equivalent to a gift and acceptance which was a valid transfer as between coheirs of undivided property;

(3) that L having complete dominion of the property was competent to dedicate it by way of wakf;

(4) that L's declaration amounted under the circumstances to the creation of a valid wakf. [P 153 C 1]

Pettigara—for Plaintiff.

Tyabji and Kanga—for Defendants.

Judgment.—The plaintiff applies by this originating summons for the construction of a deed of partition and particularly for a declaration as to whether a valid wakf has been created by it.

The deed of partition was executed by the heirs of Husseinbhai Chimnaji Tamboli on 29th June 1899 and by it they divided his estate. The heirs were the widow, the sister and the paternal uncle, and the estate was divided into three parcels, one of which was allotted to each heir. The parcel allotted to the sister Lalbai consisted of two houses, one in Teli Gully and the other in Nagdevi Road. The uncle and widow relinquished all claims to this parcel and Lalbai covenanted that the entire parcel should become her property absolutely from the date of the deed and she further covenanted:

"to spend one-fourth of the same in charity and for the spiritual benefit of the deceased performing the ceremony of Agiari Maulood and other charities as the deceased used to make, and that

she constitutes and declares herself a trustee of the said one-fourth for the said purposes."

This is the portion of the deed to which the originating summons relates.

Now, it seems to me clear that the surrender of the coheirs in favour of Lalbai and Lalbai's covenant to become owner transferred the entire dominion of this parcel to Lalbai. This surrender and the covenant are equivalent to a gift and acceptance which is a valid transfer as between coheirs of undivided property: *Mahomed Buksh Khan v. Hosseini Bibi* (1). Lalbai having complete dominion of the parcel was competent to determine it by way of wakf.

According to Abu Yusuf she can do so by a mere declaration, but according to Imam Mahomed the wakf is not complete until there has been delivery of possession.

The authority of Abu Yusuf on this point has received preference in this Court in the case of *Abdul Razak v. Bai Jimbabai* (2). Imam Mahomed goes the length of saying that a wakf cannot be created of an undivided share of property. This is the result of his opinion that transfer of possession is necessary for the completion of a wakf. But wakfs of undivided shares in property are common. Fatawa Alamgiri prefers Abu Yusuf's opinion that such wakfs are valid: Baillie, p. 564, Wilson, Edn. 4, p. 362.

It seems therefore that Abu Yusuf's opinion is the correct opinion, and in the present case the settlor having appointed herself muttawali or trustee, I doubt if even Imam Mahomed would require transfer of possession.

It is settled law that a settlor may appoint himself muttawali, and the words of the deed quoted above are an explicit declaration of trust and the purposes are such as recognized by Mahomedan law: Wilson, para. 323.A. The answer to question 1 is in the affirmative.

Questions 2 and 3 are referred to the Commissioner to ascertain what amount should be set apart for the wakf and to frame a scheme for the purposes of the wakf and to recommend the names of persons to be appointed trustees.

Costs and further directions reserved.

G.P./R.K.

Order accordingly.

(1) [1888] 15 Cal. 684=15 I. A. 81=5 Sar. 175 (P.O.).

(2) [1912] 14 I. C. 988.

A. I. R. 1920 Bombay 153

SCOTT, C. J. AND HAYWARD, J.

Asharam Ganpatram Gor—Plaintiff—Appellant.

v.

Dakore Temple Committee—Defendants—Respondents.

First Appeals Nos. 75, 76, 78, 80, 121, 122, 149, 203 and 223 of 1915, Decided on 11th April 1919, from decision of Dist. Judge, Ahmedabad, in Misc. Appln. No. 12 of 1912.

Hindu Law—Religious endowment—Shevaks are bound to render accounts like trustees—They cannot levy fees for religious services in temple—Disciplinary rules can be made and enforced, but persons entitled to worship cannot be excluded.

The shevaks of a public temple are not the owners of the temple; they are liable as trustees to render an account of their management. By virtue of their office they have no authority to levy fees in respect of any public religious services held in the temple.

Rules can be made and enforced by the shevaks to ensure good order and decency of worship and to prevent overcrowding in the temple, but subject to these rules the right of entrance into a public temple, for the purposes of worship, of the members of a caste entitled to worship, there is a free right and cannot be prohibited or sold.

[P 154 C 2]

G. S. Rao, B. G. Rao, H. V. Divatia, G. N. Thakor, C. Setalvad, M. K. Mehta, Inverarity, M. W. Pradhan and N. K. Mehta—for Appellant.

Jayakar, Ratanlal Ranchhodas and Strangman—for Respondents.

Judgment.—These appeals and applications relate to the rules which have been framed under Cl. 12 of this scheme and sanctioned in 1914 by Mr. Kennedy, the District Judge of Ahmedabad. The appeals have been filed as appeals from orders in execution passed under Cl. 12 (7) of the scheme by the District Judge of Ahmedabad. We think we ought to deal with them as such as no objection has been taken. No orders need therefore be passed on the applications filed ex majore cautela as applications under Cl. 20 of the scheme reserving general powers of interference to the High Court. We have heard Sir Chimanlal Setalvad on behalf of the Tapodhan Shevaks in Appeal No. 80 of 1915, Mr. Mehta on behalf of the Khedaval Shevaks in Appeal No. 79 of 1915, and Mr. Inverarity on behalf of the Shrigor Shevaks in Appeal No. 78 of 1915. We have heard Diwan Bahadur Rao on behalf of the Tarwadi Mewada Gors, represented in the second suit, in Appeal No. 122 of

1915, Mr. B. G. Rao for other Tarwadi Mewada Gors, so represented but by mistake struck out of these proceedings by the District Judge, in Appeal No. 206 of 1915, Mr. Divatia on behalf of other Tarwadi Mewada Gors, not so represented in Appeal No. 75 of 1915, and Mr. Thakor on behalf apparently of an altogether different group of Gors in Appeal No. 76 of 1915. We have heard Diwan Bahadur Rao again on behalf of the representative of the family of Tambekar in Appeal No. 121 of 1915. We have, on behalf of the Temple Committee heard Mr. Jayakar, and finally on behalf of the general public, the Advocate-General.

The contest has been mainly over the rules restricting by payment for passes, entry into the inner sanctuary of the temple known as the Nij Mandir. But this was the very dispute between the Shevaks and the Tarwadi Mewada Gors decided in the other suit by Mr. Dayaram Gidumal, District Judge of Ahmedabad. He observed in his judgment:

"We have almost unanimous evidence to the effect that before the Shevaks made their rules in 1883, their permission for entering the Nij Mandir was only taken at the time of the Sakribhog Darshan and at no other, and even at Sakribhog time no fixed fee was ever demanded or paid"

and again:

"But although every one could go into the Nij Mandir, every one could not go up on the Sinhasan. The idol wears ornaments worth about a lakh. It stands to reason therefore that permission should be taken for mounting the platform. It is needed by those who want to do Panchamrit or Kesar Snan or Charanasparsh. The regulation of these must in the nature of things be done by the Shevaks in attendance. The condition regarding cleanliness does not appear to have been rigorously enforced, but there is no doubt that Shevaks are entitled to refuse permission to anyone not following the usual rules regarding personal cleanliness. The Shevaks are to see to decency in worship, but this power does not mean that they can make a sweeping rule demanding tickets and fees for entrance. I therefore hold that according to the established practice of the institution the Gors were not prevented from entering the Nij Mandir whenever it was open, or doing any Dharma Kriya in the said Mandir; but that whenever such Kriya had to be performed on the Sinhasan, permission, express or implied, used to be taken from the Shevaks in attendance, which permission was never refused to decent worshippers."

He then proceeded to show that the Gors were before the rules free also to enter for Darshan or Dharma Kriya with their Yajmans and that before 1883

the Shevaks had no right to demand money from them as entrance fee for the Nij Mandir. He next discussed the question whether the Gors could take whatever was given to them by their yajmans in the Nij Mandir and came to the conclusion that they could, whether given inside or outside the Nij Mandir, and he remarked that

"it would appear from some of the witnesses that they consider it a matter of conscience to pay the Gor in the Nij Mandir."

He also stated generally:

"There is therefore not the least doubt that before 1883 every Hindu (excepting certain low caste people like Mochis, etc.) could go freely into the Nij Mandir."

He then considered whether the Shevaks had any right to change the old practice of the institution and frame the rules of 1883 for fixed fees and wrote:

"All I can say is that nothing can be more scandalous, nothing more unjustifiable. They have promulgated these novel rules which would make the hair of any Hindu loving his country's institution to stand on end. Such open sale of Darshan tickets has never been practised anywhere, and not a single witness except the three or four infatuated ones, who said the Shevaks were owners, could say a word in favour of the Shevaks' power to frame such rules."

These conclusions were confirmed and even extended by the exclusion of the exception in favour of the Sakribhog Darshan by the High Court. Birdwood, J., observed:

"The Shevaks are not the owners of the temple, they are liable as trustees to render an account of their management. This was the position assigned to them by the judgment in *Manohar Ganesh Tambekar v. Lakkmiram Govindram* (1). And we do not think that by virtue of their office, as defined in that case, they have the authority to levy fees in respect of any public religious services held in the temple. *Kalidas Jairam v. Gor Parjaram Hirji* (2)."

And Parsons, J., remarked:

"Such of the rules which forbid admission to the Mandirs, except on the production of a pass to be obtained on payment of a fee, are undoubtedly illegal and ultra vires. Rules can be made and enforced by the Shevaks to ensure good order and decency of worship and to prevent overcrowding in the temple, but subject to these rules the right of entrance into a public temple such as the present, for the purposes of worship, of the members of a caste entitled there to worship, is a free right and cannot be prohibited or sold. *Kalidas Jairam v. Gor Parjaram Hirji* (2)."

No appeal was made from this decree of the High Court to the Privy Council. It has however been argued on behalf of the Shevaks, with the support of

(1) [1888] 12 Bom. 247.

(2) [1891] 15 Bom. 309.

the Temple Committee, that the rules have been validated by having been in force since 1883 and by having been revived in 1888 by the receiver in the present suit [*Manohar Ganesh Tambekar v. Lakhmiram Govindram* (1)], with the approval of Mr. McCorkell, the District Judge of Ahmedabad, and in 1892 of the High Court, and by having been continued in force pending the framing of fresh rules under Cl. 12 (4) by the provisions of Cl. 13 of the scheme of management prepared in 1906 by the High Court and finally sanctioned in 1912 by the Privy Council. It seems to us however that these arguments have no solid foundation, as urged on behalf of the Gors and the general public. The radical objections to the rules have been repeated by Mr. Kennedy, the District Judge of Ahmedabad, thus:

"The first question then as regards these rules is the pass system. There is no objection to the pass system itself, by which only pass holders are admitted with certain exceptions into the Nij Mandir and where special passes are issued for particular acts of devotion. But a great deal of objection is raised to the levy of fees for the passes. It does seem to me somewhat of a scandal that the opportunity of acquiring religious merit should be sold in this way formally and nakedly. I do not suppose any other temple in India does anything of the sort. There are fees no doubt levied at other temples ad valorem of the religious benefit, but these are secular taxes imposed by the Government."

He did not consider the levy of fees necessary to prevent overcrowding, but did not press his objections in view of the fact that the levy had been practised for at least thirty years and was strongly favoured by the Temple Committee. He failed, however to notice that this practice had been in question from the very outset and had been declared illegal and ultra vires in the other suit by his predecessor Mr. Dayaram Gidumal in 1888 and in 1890 by the High Court. Its revival or rather survival under the receiver from 1888 in the present suit was a temporary arrangement pending the settlement of the scheme of management and was so sanctioned by Mr. Dayaram Gidumal's successor Mr. McCorkell in 1891 and in 1892 by the High Court. It was similarly permitted as a temporary arrangement only pending the framing of regular rules under Cls. 12 (4) and 13 and Sch. 5 of the scheme in 1906 by the High Court and in 1912 by the Privy Council. It seems to us therefore that the rules pres-

cribing the pass system have been shown to be illegal and ultra vires, in so far as they have imposed fixed fees in payment for the passes, whether upon the Gors or the general public entitled to worship in the temple at Dakore. It has to be remembered that the rules when sanctioned become a part of the scheme of management under Cl. 12 (7), subject under Cl. 20 to the control of the High Court, and that it was provided that the scheme should be in accordance with the established practice of the institution by the preliminary judgments both of the High Court and of the Privy Council.

[Note: The rest of the judgment is not necessary for the purposes of this report.—Ed.]

A. I. R. 1920 Bombay 155

MACLEOD, C. J. AND CRUMP, J.

Harilal Lallubhai — Plaintiff — Appellant.

v.

B. B. & C. I. Railway—Defendants — Respondents.

Second Appeal No. 692 of 1918, Decided on 17th December 1919, from decision of Dist. Judge, Ahmedabad, in Appeal No. 442 of 1916.

Railways Act (9 of 1890), S. 7—Closing one level crossing and opening another is within competence.

A railway company is well within its power, when, owing to the exigencies of the railway, it closes a level crossing at a certain point and fulfils all the requirements which the law imposes upon it by providing another level crossing at another point lower down the line.

[P 156 C 1]

I. N. Mehta and *M. B. Dave*—for Appellant.

Campbell and *Crawford*—for Respondents.

Macleod, C. J.—The plaintiff, who is the owner of a bungalow on the west side of the B. B. & C. I. Railway close to the Nadiad Station, brought this suit against the railway company claiming a mandatory injunction directing the company to have the old gate way at the level crossing referred to in para. 2 of the plaint reopened, or to have some other convenient way made by the defendant Company for egress from and access to his bungalow or any other relief that the Court might deem fit with costs of the suit. The plan which has been produced shows the situation of the plaintiff's bungalow. The old level crossing was at point A and the new level

crossing is at point D. Owing to the necessity of increasing sidings at Nadiad Station, the Railway Company closed the level crossing at A and diverted the road to the crossing at the point D. It is obvious that point A was no longer a suitable place for a level crossing where constant shunting would be going on and those who wanted to cross the railway would probably be much inconvenienced by having to wait until the line was clear.

The plaintiff complains that he is inconvenienced because he has to go a longer distance, if he wishes to cross the railway, and he also complains that at the point B on the map there is a dip in the road which makes it impossible to get to the point C during the monsoon. The plaintiff relied upon the Railways Act, S. 7, but it is quite clear that that section affords him no assistance whatever. The Railway Company must necessarily under the statute have very wide powers in order to carry on its business for public purposes, and it has got to consider not only the convenience of one owner of property bordering near the line, but it has also got to consider the necessity for affording facilities to the public who wish to travel on the railway and send their goods by the railway, and it cannot possibly consider separately the interests of each individual who happens to live in the neighbourhood of the railway line. It is quite true that the plaintiff in this case may have to go a few hundred yards farther than before if he wishes to cross the line to go over to the east side, and it seems to be admitted that there is a place in the road between his bungalow and the crossing at point D, which certainly ought to be improved, but that is a matter for the road authorities and not for the Railway Company, and if the plaintiff, instead of wasting his time asking the Court to grant his preposterous demands, had represented his case to the Road Authorities, it is quite certain that a remedy would have been provided before now. In my opinion the decision of the learned District Judge was perfectly correct, and there can be no doubt that the Railway Company were well within their powers in closing the level crossing at the point A and they had fulfilled all the requirement which the law imposed on them by providing

another level crossing at point D. The appeal therefore is dismissed with costs.
Crump, J.—I concur.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 156

HEATON AND MARTEN, JJ.

Fort Press Co., Ltd.—Defendants—Appellants.

v.

Municipal Corporation, Bombay — Plaintiffs—Respondents.

Original Civil Appeal No. 30 of 1919, Decided on 31st July 1919, from decision of Macleod, J., in Original Suit No. 358 of 1918, D/- 24th February 1919.

Land Acquisition—Parties agreeing as to amount of compensation — Agreement held enforceable.

The Municipal Commissioner of Bombay negotiated with the defendant Company for the acquisition of their premises on behalf of the Municipal Corporation. Having failed to arrive at any agreement as to the price to be paid for the premises the Municipal Commissioner moved Government to compulsorily acquire the property on behalf of the Municipal Corporation under the Land Acquisition Act. Negotiations, in the meantime, were resumed and an offer was made to the Company to take the premises for Rs. 1,45,517-12-0. After this offer was made, the Government issued a notification, under the Land Acquisition Act for the acquisition of the property. The Directors of the Company resolved to accept the offer and through their Secretary, informed the Engineer of the Corporation that "the Company was willing to accept without prejudice the sum of Rs. 1,45,517-12-0" for the property and this was approved by the Municipal Commissioner. A meeting was held before the Collector and the agreement was recorded. Subsequently the Company withdrew the offer made and put in a claim for Rs. 5,71,660 as compensation for compulsory acquisition. The Municipal Corporation thereupon brought the present suit for a declaration that there was a contract binding on the Company and that the Company was not entitled in the proceedings before the Collector to any sum in excess of Rs. 1,45,517-12-0. The Company contended that there was no contract between the parties; that their letter to the Municipal Engineer was not a proposal as to what they were willing to accept but was an invitation to the Corporation to make a proposal on terms which the Company were prepared to deal with; that if there was an agreement it was void and of no effect; and that neither party was bound by it. The trial Court decreed the claim for the declaration prayed for and the Company appealed:

Held: that the claim had been rightly decreed; that there was an agreement binding on the Company as to the amount of the compensation to be paid for their premises; that the Municipal Corporation were entitled to make such an agreement before the Collector had

made his award; and that the agreement could be specifically enforced against the Company.

Desai and Kanga—for Appellants.

Coltman and Campbell—for Respondents.

Marten, J.—This is an appeal by the defendant Company from the judgment of Macleod, J., dated 24th February 1919, in favour of the plaintiffs, the Bombay Municipality. The case arises out of proceedings under the Land Acquisition Act 1894, for the compulsory acquisition of the defendants' land by the Bombay Municipality for public purposes. The real points before us are whether in law a binding agreement as to the amount of the compensation can ever be made between the Municipality and a landowner, before the Collector has made his award. If so has such an agreement been made in the present case, and how is it to be enforced?

The agreement relied on by the Municipality is contained in two documents of 12th September 1917, the first being what is alleged to be an offer on behalf of the defendant Company, and the second being an acceptance by the Municipality of that offer which acceptance was subsequently communicated to the defendants at a meeting before the Collector on the 14th September. The precise terms of these documents are I think material. The first document is a letter written by the Secretary of the defendant Company to the Executive Engineer of the Municipality and omitting formal parts, is as follows:

"Acquisition of Company's Property Armenian Lane, Fort.

With reference to the interview our Engineer Mr Vakde had with you, I have the honour to state that the Company is willing to accept without prejudice the sum of Rs. 1,45,517, inclusive of 15 per cent. for compulsory acquisition and cost of the chimney. The amount will be subject to deductions of the capitalized dues to the Collector and of the easements of the neighbouring properties if any."

The acceptance of the Municipal Commissioner is as follows:

"Discussed with E.E. Compared figures with the original estimate. I approve of the case being settled on the conditions stated in the last letter from the Fort Press Company for Rs. 1,45,517."

The plaintiffs allege in para. 18 of the plaint that these documents amount to a contract between the plaintiffs and the defendants

"that the defendants shall not claim a sum more than Rs. 1,45,517 as compensation for

their said premises in the said land acquisition proceedings and that the plaintiffs shall pay to the defendants that amount for compensation only whatever award is made in the said proceedings, and that the plaintiffs shall pay the said amount to the defendants even if the award awards a less sum for compensation."

The trial Judge has accepted this view and has granted consequential declaratory relief but has not granted any injunction.

I should explain that the words "without prejudice" in the letter of 12th September 1917 were withdrawn before the Collector on 14th September and may be disregarded; and that the reference to the cost of the chimney is made clear from previous correspondence and may also be disregarded. The reference to 'deductions of the easements' refers to the fact that any adjoining owner who could establish an easement over the property would under the Land Acquisition Act be entitled to be paid an appropriate sum out of the total compensation for the property. It would appear however, from the Collector's notes that all claims but one have been disposed of and that in that one case the adjoining owner would prefer to retain his easement of light rather than be compensated for its loss. The "15 per cent. for compulsory acquisition" refers to the amount payable under that heading by virtue of S. 23 (2) and S. 15, Land Acquisition Act. The reference "E.E." in the memo. of the Municipal Commissioner is to the Executive Engineer.

At the meeting before the Collector on 14th September 1917 both parties were represented, and the Collector's notes show that the solicitor for the Municipality put in as Ex. C the above letter of the 12th September

"showing that the Company has agreed to receive Rs. 1,45,517 inclusive of the 15 per cent. for compulsory acquisition and the Government claim if any by the holder of adjoining properties."

Mr. Vakde (the Company's Engineer) explains that the term

"'without prejudice' occurring in the letter has no longer any force as the Municipality has accepted the proposal."

At that point therefore the parties would seem to have been in complete agreement. The Company at any rate thought so as their resolution of 22nd September speaks of the amount of Rs. 1,45,517 having been "fixed" in accordance with an arrangement made by

their Engineer with the Executive Engineer and that

"an official letter was written on the 12th September to the Executive Engineer conveying acceptance of the said offer on behalf of the Company. The same is hereby noted."

It was not till the 23rd October that the Company by its solicitors sent the following letter of withdrawal:

Re: acquisition of the property of the Fort Press Co. Ltd., situate at Armenian Lane.

With reference to the letter dated the 12th September last from the Secretary of our client the Fort Press Co. Ltd., to you we are instructed by our clients to withdraw on their behalf the offer made by them in that letter for the sale to the Municipality of their property situate at Armenian Lane at Rs. 1,45,517 and accordingly beg to do so hereby."

I regard this letter as very material in considering what view of the matter the Company took at the time as opposed to the various contentions which their counsel have since put forward.

Meanwhile, one other meeting before the Collector had been held on the 10th October and further meetings were held on the 31st October, 22nd and 29th November and 17th December, apparently without formal repudiation by the Company of the alleged agreement. At the meeting however before the Collector of 29th January 1918 the Company was represented by counsel and contended: that no agreement had been arrived at and that even if there had been that was not the proper place to decide that matter and that they were entitled to lead evidence as to value. They also on the same day made a formal claim for Rs. 5,71,660 as compensation, and objected to the measurement made under S. 8 of the Act. Thereupon, after some discussion, the proceedings were adjourned by the Collector.

On 12th March 1918 the present suit was instituted by the Municipality. It will be noted that in para 12 of the written statement, the defendants pleaded that the agreement, if any "is void and of no effect. Neither party is bound by such agreement." As to this the learned trial Judge, in dealing with the issues, says:

"It will be noted that the defendants no longer contended that if there was an agreement it was void or that the agreement set up by the plaintiff was an agreement for the sale of the property in question."

Out of the eight issues raised at the trial the first six depended on whether there was an offer and an acceptance by

the plaintiffs and the defendants or their duly authorized agents. Before us Mr. Desai for the appellants only relied on issue 1. He admitted that if the company's letter of 12th September amounted to an offer, the remaining five issues 2 to 6 (inclusive) would be decided against him, as would also be issue 8. On this point I entertain no doubt whatever that the Company's letter is an offer and not a mere invitation to make offers. The theory of an invitation is hopelessly inconsistent with amongst other things, their own resolution of 22nd September and their own solicitors' letter of 23rd October. It accordingly follows that on this point I entirely agree with the judgment of the learned trial Judge, and that consequently the defendants fail on issues 1 to 6 and No. 8.

This leaves only issue 7, viz., whether the agreement, if any, was merely arrived at for the purpose of proceedings under the Land Acquisition Act, and if so whether such an agreement can be specifically enforced by the plaintiffs against the defendants. But before dealing with this issue, I will by way of warning, add that one must dismiss from one's mind the practice and procedure in England under the Land Clauses Consolidation Act, 1845, with its ample facilities for landowners to come to binding agreements with the promoters both before and after notice to treat has been served. To an English lawyer familiar with that Act, the question which I have referred to could have but one answer. But the Land Acquisition Act has been framed on such entirely different lines that it requires careful considerations before one determines what is and what is not permissible under it; and in particular whether the object of the Indian legislature was not to keep all control in the hands of Government, and to prevent any financial agreements between a landowner and a local authority being arrived at unless the express consent of Government was obtained.

I think therefore it is material to consider what were the respective positions of the parties at the date of the agreement. Under the City of Bombay Municipal Act, 1888 (Act 3 of 1888), the Municipality have wide powers of acquiring land. Only S. 517 was cited to us but I think other sections are material.

Under S. 61 (m) it is the duty of the Municipality to make adequate provision for (inter alia) the construction and improvement of public streets. This should be read with S. 296, which gives wide powers to the Commissioner, subject to the provisions of Ss. 90 to 92, to acquire land for such purposes and to dispose of the same. S. 87 also gives a general power to the Corporation to acquire and hold land. In the present case the defendants' land is required for what is usually known as the Church Gate Street Improvement. This, as will be seen on looking at the plan, Ex. H, to the plaint, involves widening of Church Gate Street and the construction of a new street between it and Meadows Street to relieve the great congestion of traffic in this locality.

Subject to certain restrictions the entire executive power for the purpose of carrying out the provisions of the Act vests in the Municipal Commissioner (see S. 64), and he enters into contracts on behalf of the Corporation: see S. 69. Under S. 90 any land to be acquired for the purposes of the Act may be acquired by the Commissioner on behalf of the Corporation by agreement subject to the approval of the Standing Committee. In the present case negotiation for that purpose began as long as August 1916 but no argument was arrived at.

Section 91 I will quote in full, viz.:

(1) "Wherever the Commissioner is unable to acquire any immovable property under the last preceding section by agreement, Government may, in their discretion, upon the application of the Commissioner, made with the approval of the Standing Committee, order proceedings to be taken for acquiring the same on behalf of the corporation, as if such property were land needed for a public purpose within the meaning of the Land Acquisition Act, 1870."

[This reference is now to the Land Acquisition Act, 1894; see that Act, S. 2 (3)].

That such an application was made by the Commissioner is pleaded in para. 3 of the plaint and not denied in the written statement.

Sub-section (2), S. 91, City of Bombay Municipal Act is as follows:

"The amount of compensation awarded and all other charges incurred in the acquisition of such property shall, subject to all other provisions of this Act, be forthwith paid by the Commissioner and thereupon the said property shall vest in the Corporation."

This subsection does not say whether the Commissioner is to pay this sum to

the Collector or to the landowner direct, but if the latter, it varies S. 31, Land Acquisition Act under which the Collector is the person to pay the compensation, and in any event it would seem to vary S. 16 of that Act, which provides for the land vesting absolutely in Government free from all incumbrances.

Section 92 gives power to dispose of property. S. 517 (h) gives wide powers to compromise. The financial provisions will be found in Chs. 7 and 8. S. 111 provided for the establishment of a Municipal fund, and S. 139 for certain taxes to be levied by the Corporation.

I think I have now stated enough to show that the Bombay Municipality have wide independent powers, as indeed one would expect in a Corporation of their importance; and that the intervention of Government is only necessary to enforce an acquisition, and even then it is the Municipality which pays and the Municipality which gets the land.

Turning next to the Land Acquisition Act, 1894, it is formally the Government which acquires the land: [see Ss. 6 (3) and 7] and it vests in them: see S. 16. Further although the land is acquired at the expense of the Municipality (see S. 50), still it is the Collector who pays the compensation directly: see S. 31. As I have already indicated, the above provisions are or may be modified in the present case, having regard for S. 91, City of Bombay Municipal Act. Then under S. 11, Land Acquisition Act it is the Collector who has to determine, in the first instance the amount of compensation which in his opinion should be allowed for the land. Further, he has to apportion the compensation between the various persons entitled [see S. 11 (3)] unless they agree amongst themselves as to how this shall be effected, in which he accepts such agreement: see S. 29. He also may have power to make arrangements with landowners: see Ss. 31 (3) and (4).

Even when the Collector had made his award, that is not final. It only amounts to an offer by Government: see S. 31 and *Ezra v. Secy. of State* (1) and *Ezra v. Secy. of State* (2). If that offer is not accepted, any person interested may require the matter to be referred to the

(1) [1903] 80 Cal. 26=7 O. W. N. 249.

(2) [1905] 82 Cal. 605=82 I. A. 98=9 Sar. 779 (P. C.).

Court : see S. 18. But the local authority is not entitled to demand this reference [see S. 50 (2)] ; and if the applicant has made a claim to compensation, the amount awarded to him by the Court is not to exceed the amount so claimed or be less than the amount awarded by the Collector : see S. 25. Further, there is a very important power given by S. 48 to Government to withdraw from the acquisition of any land of which possession has not been taken, subject to paying compensation for any damage thereby caused; see S. 48 (2).

The appellants say that this S. 48 enables Government to withdraw from the compulsory acquisition altogether, should they find the award too expensive and provided of course possession has not been taken. They further rely on this section as showing a want of mutuality in the alleged agreement.

Under these circumstances, I think that at the date of the agreement in question the position of the parties was as follows: the defendants had to part with their land having regard to the Government Notification of 23rd July 1917 for compulsory acquisition. The Municipality was to get the land and also to pay for it. The only questions were the amount of compensation and the positions of third parties. Possibly an ordinary agreement for sale could have been arrived at and the Government Notification withdrawn *qua* that land. But then the Municipality would not have got the benefit of the Land Acquisition Act and the clean title thereby obtained free from all incumbrances. It would therefore seem reasonable from a business point of view for the parties to complete the transaction through the medium of the Act and in that way deal with the claims of third parties; but that this method of completion should not as between the Municipality and the company affect the figures agreed on. Otherwise why trouble to agree as to the figures at all?

What then is the effect of the agreement? According to the present contention of the defendants the agreement means nothing. It is a nullity. So also are the five resolutions of the company dated 1st June, 14th July, 31st August and 7th and 22nd September 1917. This contention seems to me wholly inconsistent not only with their own solicitors' letter of 23rd October 1917, but also with the

desire of the law to give such business efficacy to business transactions, as both parties must have intended it should have. Thus in *The Moorcock* (3) Lord Justice Bowen said as follows :

"The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe, if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men, not to impose on one side all the perils of the transactions, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

If then the agreement was not a nullity it seems to me that it was either: (1) an agreement to make mutual admissions as to value, but that nevertheless the Municipality should give and the company should accept whatever sum the Collector or the Court might eventually award; or else it was (2) an agreement definitely fixing the compensation as between the parties themselves, whatever sum may ultimately be awarded by the Collector and with an obligation on either party to refund any excess or make good any deficiency as the case might be. In my judgment the latter is the true view. I think the intention of the parties was to arrive at a definite figure for better or for worse; and not to leave the matter open to the costs and uncertainty of future litigation before the Collector or the Court. Apart from the interests of possible third parties this would present no difficulty; and in the present case the claim of the only third party seems to be mainly for an easement of light to some privy windows.

Put, therefore in another way, the agreement amounts in effect to a sale, as stated in the company's letter of 23rd October, but with this special feature, viz., that the purchase money was to be subject to a possible deduction for easements

(3) [1889] 14 P. D. 64=58 L. J. P. 73=60 L. T. 654=37 W. R. 489=5 Asp. M. C. 273.

in favour of a third party, the amount of such deduction, if any to be ascertained by the Collector or the Court under the Act. Or, again, if all this be written in full, the result is in substance what is pleaded in para. 18 of the plaint and asked for by way of declaration in prayers 2, 3 and 4.

It was urged that the terms so pleaded as being the effect of the agreement are not expressly stated in the agreement. It seems to me however that these terms may be fairly implied from the language actually used and the surrounding circumstances, and that they ought to be so implied. I have already referred to "*The Moorcock*" (3) as an illustration of an important implication being made. I may also refer to the *Butterley Company Limited v. New Hucknall Colliery Company Limited* (4), where in a lease of a lower seam of coal the Court implied a license to cause subsidence to the upper seam as otherwise about 70 per cent. of the coal in the lower seam would have been left unworked, assuming the ordinary method of working, viz., the long wall system, were adopted. There was no such express license in the lease, and the case was of the greatest importance in the coal mining industry as it governed many others and large sums depended on whether the implication could and ought to be made in favour of the mining lessees. In the present case, the implication we are asked to make is to prevent what the Company at one time called "an offer . . . for sale. . . Rs. 1,45,517" being turned into what they now say is a nullity or alternatively a nonbinding admission as to value.

Then again, if one tests the matter under the Contract Act, I think we have a "contract" within the meaning of Ss. 2 and 10, Contract Act. As I have already held there is here a proposal and an acceptance. I think there is also consideration within the meaning of S. 2 (d) and (e). For instance, I think there are reciprocal promises to admit that the true value is Rs. 10. This I think relieves either party from the expense of calling evidence of value before the Collector, at any rate, so far as his opponent is concerned. In this connexion, I may refer to S. 50 (2), Land Acquisition Act, under which the local authority are en-

titled to appear before the Collector and adduce evidence for the purpose of determining the amount of compensation.

If a similar matter arose in a suit for damages and the parties agreed on the damages, the Court under O. 23. R. 3, would record such agreement and pass a decree for damages in accordance with the agreement arrived at. No doubt the Collector is not a "Court," but on any appeal from him to this High Court, the provisions of the Civil Procedure Code would apply so far as not inconsistent: see S. 53, Land Acquisition Act. Consequently, it seems to me that if this agreement had been made after the award of the Collector and after a reference made to the Court under S. 18 it might have been open to the Municipality to apply that the Court should record the agreement and act upon it in accordance with O. 23, R. 3, provided of course the interests of the other parties were not prejudicially affected. What real difference in principle is there then between such an agreement after the award and one before it? No doubt, when the Collector makes his award, that fixes the minimum, though not the maximum, under the Act. But that seems to me only a matter of degree.

As regards the consideration, so far as the Municipality is concerned, I see nothing unlawful in what they have agreed to do. It did occur to me whether if the award was less than the sum agreed on, it would be ultra vires for the Municipality to pay more than the sum which the officer appointed by the Act had fixed as the appropriate sum payable under that Act. But having regard to the wide powers of the Municipality which I have referred to it seems to me that this point cannot fairly be maintained. Under S. 91 (2) the direction to pay the "compensation awarded" is to be "subject to all other provisions of this Act," and I think this preserves (inter alia) the power to compromise given by S. 517. Be that as it may, the Company gave up in the Court below its contention that the agreement was void: and I see no express allegation that this agreement was ultra vires the Municipality. It seems to me therefore that in any event the point is not open to them now.

Under the above circumstances I think the agreement here was for a lawful con-

(4) [1910] A. O. 331 = 79 L. J. Ch. 411 = 102 L. T. 609 = 6 T. R. 415.

sideration and for a lawful object and was consequently a "contract" within the meaning of S. 10, Contract Act, provided it was enforceable at law.

Now putting aside for a moment the question of specific relief, why should not this agreement, if necessary, be enforced in law by damages? If, for instance, the defendants proceed as they did on 29th January 1918, and in defiance of this agreement insist on a claim for some five and three-fourths lacs, and if they eventually succeed in that claim, why should not the Municipality be entitled to claim from them the difference between the compensation actually awarded and the amount which the defendants agreed with them to accept? I recognize that such an award might be due to other causes than the increased claim, but I will assume a case where it would be due to such a claim. I quite agree with the learned trial Judge that the question at the present moment is premature, because until the amount is finally fixed by the Collector or the Court under the Land Acquisition Act the actual damages (if any) cannot be ascertained. But there is no difficulty in testing the matter now in that way in principle. It seems to me therefore that damages would in certain events be obtainable by the Municipality, and similarly, if the award was less than the sum agreed on I think the defendants might recover the difference from the Municipality. It seems to me therefore that this contract is enforceable at law, namely, in damages.

It is however said that the power of withdrawal given by S. 48 to Government might render the whole proceedings nugatory, and that consequently there is no mutuality. Counsel however for the Municipality, after due consideration, stated in Court that even if the Government withdrew, the Municipality would be obliged to pay the sum agreed on. It may be that the Municipality cannot now improve their position by this admission if that was not the true legal position at the date of the agreement. But, even supposing that the agreement is determinable in a certain event, that does not necessarily make it void now. One can, for instance, enter into a perfectly valid agreement for the sale or purchase of property, but with the proviso, that the agreement should be void if the sanction

of the High Court is not obtained within six months or alternatively if any land acquisition notice be issued within a specified time.

Accordingly, I do not think that S. 48, even if it applies here, prevents the agreement being a good one.

As regards the unreported case — *Appeal No. 32 of 1917* — relied on by the appellants, I respectfully agree with the criticism of the learned trial Judge. The point there before the Court was entirely different; and the observations quoted are obiter. The case is I think of no real assistance in the present dispute.

The next and last point brings us to the actual relief which the learned Judge has granted, namely, the declaratory relief set out in the decree under appeal. In one sense I think that the precise relief to be granted at the present moment — apart of course from the first declaration as to the existence of an agreement — is a matter of small importance. I should imagine that any tribunal required to assess a money value would readily accept the sum arrived at by the parties after a year's hard bargaining. I should have thought also that it would be open to the Collector to say that in view of the agreement arrived at and the admission thereby made he would decline to allow the parties to adduce evidence in contradiction of that admission; at any rate unless they could first show that they had been misled by fraud or by some very extraordinary circumstances. But there is not a hint in the proceedings as to anything of that sort. Nor indeed is there any explanation offered of the Company's startling claim for nearly 5.3/4 lacs as against the previous agreement for under 1-1/2 lacs. Supposing therefore that no further declaratory relief is granted the probabilities would seem to be that the Collector would base his award on the figures of the agreement, and that if any appeal was brought by the defendants from that award it would be unlikely to succeed. But that is a matter of speculation. On the whole therefore I think it is right to provide for contingencies, however remote, and to define clearly the views of the Court as to what the rights of the parties are under the agreement. In that view of the case I think the declaratory relief is substantially correct and that it is no objection that substantive relief is

not also given: see *Dyson v. Attorney-General* (5) and Special Relief Act, S. 42.

But to avoid any misunderstanding I wish to say that the decree of the Court must not be understood as interfering in any way with the Collector. We are merely determining whether there was an agreement, and what are the rights of the parties under it. It is for the Collector to decide in his own way what the true compensation is and to be complete master of the proceedings before him. In this connexion, it may be noticed that Macleod, J., expressly declined to grant an injunction, and I respectfully agree with the view he took in respect of that. Consequently, I think that we are not really infringing that very salutary general principle that where the legislature has provided a special tribunal for determining a particular dispute, the parties shall resort to that tribunal and not bring the matter to the High Court, at any rate until the tribunal designated by the legislature has given its decision: see *Grand Junction Waterworks Company v. Hampton Urban District Council* (6).

I think however that the decree as eventually drawn up is open to possible misconstruction as to the intention of this Court not to interfere with the proceedings before the Collector. I think therefore that the last three declarations should be varied and run as follow:

"And this Court doth further declare that upon the true construction of the said agreement and as between the parties thereto: (a) the defendants are not entitled to claim in the proceedings before the Collector under the Land Acquisition Act any sum for compensation other than Rs. 1,45,617 or to proceed in the said proceedings on any other footing; and (b) the defendants are not entitled to any compensation in the said land acquisition proceedings beyond Rs. 1,45,517, after allowing thereout for deductions of the capitalized dues to the Collector and of the easements of the neighbouring properties, if any; and (c) that if the Collector awards as compensation a sum more or less than Rupees 1,45,517, the excess or deficiency will have to be adjusted as between the plaintiffs and defendants on the basis of the figures and terms agreed upon in the said contract, and the sum found due as the result of such adjustment will

have to be paid or made good to the defendants or the plaintiffs as the case may be."

The rest of the decree should stand. I have suggested the variation of the original wording of the third declaration, as I am not satisfied that it is arithmetically correct in all contingencies, e. g., if the value of the easement varies with the value of the defendants' property.

In the result I am of opinion that the decision of the learned trial Judge is right and, in the view I take and subject to the formal variations I have mentioned, this appeal should be dismissed with costs.

In conclusion I would add by way of warning that this case seems to me an exceptional one, and that, in my opinion, it must not be taken as encouraging the parties to come to the High Court over disputes in matters pending before the Collector under this Act. Nor do I see any adequate reason why the Collector should necessarily adjourn this proceeding pending such a High Court suit. No doubt he has done so in the present case out of courtesy, but one can imagine cases where important works might be thereby delayed to the great detriment of the general public.

Heaton, J.—I need not recapitulate the facts which are fully stated in my learned brother's judgment. Two explanations are possible to account for the real meaning and intent of the acts of the parties. The first is that accepted by my Lord the Chief Justice who heard the case, and by my brother Marten, that there was a binding contract. The second is that the parties agreed as to the value of the property and left everything else to be dealt with by the award of the acquiring officer. In other words that there was not a contract, but merely a mutual admission of the value of the property. My mind inclines to this latter view. But I do not press it. If the former view is accepted then I think everything stated in the judgment of my brother Marten follows. I therefore assent to the dismissal of the appeal with the suggested modifications in the declarations, and with costs.

G.P./R.K.

Appeal dismissed.

(5) [1911] 1 K. B. 410=80 L. J. K. B. 531=103 L. T. 707=55 S. J. 168=27 T. L. R. 143, on appeal (1912) 1 Ch. D. 158=81 L. J. K. B. 217=105 L. T. 753=28 T. L. R. 72.
(6) [1898] 2 Ch. 331=67 L. J. Ch. 603=78 L. T. 673=46 W. R. 644=62 J. P. 566=14 T. L. R. 467.

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SCOTT, C. J. AND HAYWARD, J.

Tata Industrial Bank Limited—Plaintiffs—Appellants.

v.

Rustomjee Byramjee Jeejeebhoy and others—Defendants—Respondents.

Original Civil Appeal No. 11 of 1918, Decided on 20th January 1919, from decision of Kajiji, J.

Specific Relief Act (1 of 1877), Ss. 14 and 15—Property otherwise fully described and known and stated to be 1,480 yards but found to be only 1,280 yards — Defendant held not unable to perform contract within S. 14—Part left unperformed held considerable and no specific performance could be claimed with compensation.

Plaintiff contracted to purchase certain property from the defendants for over Rs. 7,00,000. In the agreement the property was clearly and specifically described by names, boundaries and numbers and it was also added that it measured 1,480 square yards. It was subsequently found that the property measured only 1,280 yards. Plaintiff claimed specific performance with compensation:

Held: (1) that the property having been otherwise sufficiently described and having been fully known to the plaintiff, the mention of 1,480 square yards was no more than a false description which had prejudiced no one;

(2) that there being no possible doubt as to the property agreed to be transferred the defendants could not be said to have been unable to perform the whole of their contract within the meaning of S. 14.

(3) that even if it could be held that there had been failure on the part of the defendants to perform the whole of their part of the contract the part left unperformed was so considerable that it could not be said that it bore only a small proportion to the whole in value within the meaning of the same section.

(4) that therefore on either ground the plaintiff was not entitled to specific performance with compensation. [P 165 C 2]

Strangman and Weldon—for Appellants.*Kanga and Desai*—for Respondents.

Scott, C. J.—This is an appeal from a judgment of Kajiji, J., delivered on an originating summons taken out for the determination of the question whether the plaintiffs or one of them are or is not entitled to specific performance of so much of the contract of 10th December 1917 as the defendants can perform and compensation in money for the deficiency. The defendants are the present trustees of the Jeejeebhoy Charity Fund and as such trustees are the owners of an immovable property in Meadows Street for the sale of which at the price

of Rs. 7,41,000 they have obtained the sanction of the Court. The agreement between the defendants and the plaintiffs is contained in two letters of 10th December 1917. The first is an offer by the defendants the material passages in which are:

"Our clients have agreed to sell to you their property at Meadows Street containing by admeasurement 1,482 square yards or thereabouts of quit and ground rent tenure bearing Collector's old No. 131, 131, new no. 4977, 4978 and new Survey No. 9429, and Municipal Ward A, No. 1120, Street No. 117, for the sum of Rs. 7,41,000. Our clients have brought to your notice that notice has been served on them under the Land Acquisition Act for compulsory acquisition of a part of the property, namely, 160 square yards or thereabouts, situate at Armenian Lane, and the sale is subject to the sanction of the Court."

The acceptance was in the following terms. Messrs. Tata Sons & Co. wrote:

"With reference to your letter of date written on behalf of your clients, trustees of Jeejeebhoy Dadabhoi Charity Fund, we beg to confirm the agreement to sell to us their property at Meadows Street mentioned therein for the sum of Rs. 7,41,000 upon the terms and conditions mentioned therein. We enclose herein our cheque for Rs. 25,000 by way of earnest money."

On 18th February the solicitors of the plaintiffs' bank submitted to the defendants' solicitors a draft conveyance in the schedule to which the area of the property to be conveyed was stated to be 482 square yards. On 15th March the same solicitors wrote to the defendants' solicitors as follows:

"We were compelled to send for the engrossment of the conveyance etc., herein this afternoon as it was found that the area stated on the plan prepared by Mr. Chambers was shown as 1281 square yards whereas in the correspondence leading to the agreement to purchase in the deeds and in the Collector's bill the area appears as 1,480 and 1,482 square yards respectively. Under our clients' instructions we have written to Mr. Chambers this afternoon asking him to measure the property at once and we will write to you further as soon as we are in a position to do so."

On the same day the defendants' solicitors wrote:

"With reference to the plan of the property we notice that the area shown in the plan is 1,281 square yards whereas in the conveyance prepared the area is stated to be 1,480 square yards. We presume the area in the draft conveyance has been taken by you from the last conveyance. We therefore suggest that in the schedule to the conveyance the following words should be inserted after the words "1,480 square yards," "but by recent admeasurement found to contain 1,281 square yards." On hearing from you we will insert the said words in the schedule and get them initialed by our clients. Your clients may initial them when they attend to admit execution. We wish to make it

clear that our clients are not responsible for the actual area of the land whatever it may be."

To this Messrs. Little & Co. replied as follows:

"We received your letter of the 15th instant crossing our letter to you of the same date and we are unable to accept the suggestion made by you in paras. 8 and 9 on the subject of the area and we are unable to agree that your clients are not responsible for the area of the land agreed to be sold. Our clients agreed to purchase this property on the representation that it comprised 1,480 square yards and as you are aware the purchase price was calculated on that area the intention being to demolish the building now standing upon the land. If it turns out that Mr. Chambers' measurement of 1,281 square yards is correct our clients consider themselves no longer bound by their agreement to purchase, the discrepancy in area being so great as to entitle them to refuse to complete. We will inform you as soon as we have received Mr. Chambers' report."

On 23rd March 1918 Messrs. Little & Co. wrote as follows:

"Our clients desire to complete their purchase subject to a proportionate reduction in the purchase money and we have to request you to inform us at your very early convenience whether your clients will make this allowance and take the necessary steps to complete the conveyance on the revised basis. Our clients understand that Mr. Chambers valued the property agreed to be sold to them during the latter part of last year and assessed the value of the buildings now standing thereon at Rs. 30,000 for removal and the reduction in the purchase price to be paid by our clients should therefore be calculated in respect of the number of square yards by which the property is now found to fall short of 1,482 square yards at the rate per square yard at which our clients agreed to purchase that area for the price of Rs. 7,41,000."

Upon these facts the plaintiffs claim specific performance with compensation for the deficiency of 200 square yards or thereabouts which compensation being taken at a uniform rate per square yard according to the agreed purchase money for the property would work out at something like a lac of rupees. The claim is based upon S. 14, Specific Relief Act which provides that:

"Where a party to a contract is unable to perform the whole of his part of it but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money the Court may at the suit of either party direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency."

The first question which arises on the section in this case is whether the defendants are unable to perform the whole of their contract. The conclusion that I have come to is that the contract

was for the sale of the defendants' Meadows Street property subject to such deduction as there might be for the claim of the Municipality for compulsory acquisition of the Armenian Lane site in which case the compensation money would pass to the purchaser if the contract was completed.

The property to be sold is described in every possible and conceivable manner as the property at Meadows Street of quit and ground rent tenure bearing Collector's old No. 131, 131, new No. 4977, 4978, new survey No. 9429, Municipal Ward A No. 1120, Street No. 117. There can be no possible doubt as to the property agreed to be transferred. It may measure 1,482 square yards or it may measure 1,282 square yards. But whatever it measures I am of opinion that the plaintiffs had determined to buy it and were prepared to pay the price of Rs. 7,41,000. In my opinion therefore the defendants are not unable to perform the whole of their contract. The mention of 1,482 square yards though the property which has been actually measured proved to be of a smaller area is no more than a false description which prejudices no one since the subject-matter of the conveyance was known without any possible shadow of doubt.

If I could have held that there had been failure on the part of the defendants to perform the whole of their part of the contract, I should still be unable to award to the plaintiffs the relief claimed by them for the Court may only award compensation in money for the deficiency where the part left unperformed bears only a small proportion to the whole in value. According to the plaintiffs' case the part unperformed may amount to anything between Rs. 50,000 and a lac. It is one-seventh in area of the whole of this very valuable town site and it would be a misuse of language to say that the part alleged to be unperformed bears only a small proportion to the whole in value. S. 15, Specific Relief Act, indicates that where the part left unperformed forms a considerable portion of the whole the plaintiff can only obtain specific performance if he relinquishes all claim to further performance and all right to compensation either for the deficiency or for loss or damage sustained by him through the

default of the defendant. This is not the English law but it is the law deliberately enacted by the Indian legislature and applicable to all plaintiffs whether vendors or purchasers. The antithesis between Ss. 14 and 15 appears to be that in S. 14 the part unperformed must be inconsiderable whereas under S. 15 it must be considerable. There can I think be no doubt that in the present case if any portion of the contract has been left unperformed it is a considerable portion. The plaintiffs are therefore only entitled to specific performance upon relinquishing all claim to further performance and all right to compensation either for the deficiency or for loss or damage sustained by them through the default of the defendants. In my opinion therefore the judgment of the learned Judge was right, the decree should be affirmed and this appeal dismissed with costs. The Court certifies that under R. 503 this is a fit case for two counsel.

Hayward, J.—I concur. The area was not the basis of the price settled between the parties. The sale was for a lump sum. The area did not restrict the settlement to a portion only of the property. The sale was of the whole property in Meadows Street. The area was therefore no more than a "false demonstration" and not a restriction of the description of the whole property in Meadows Street. It was therefore immaterial on the ruling underlying paras. 811 to 813, Vol. 10, Halsbury's Laws of England.

It is in any case impossible to say with any show of reason that the difference of 200 square yards valued at nearly a lac of rupees bears only a small proportion to the whole in value, namely, to 1,480 square yards valued at somewhat over seven lacs of rupees. It is clear from *Illus. (a)* that that could not be held to be only a small proportion within the meaning of S. 14, Specific Relief Act. It is true that even where the part which must be left unperformed forms a considerable portion of the whole the purchaser has obtained specific performance in England but the cases have not been uniform and have led to the rule that the purchaser must nevertheless pay the full price settled for the whole property before obtaining specific performance in India. Collett has

compared the rule in England with that laid down by the latter part of S. 15, Specific Relief Act, in India at pp. 127 and 129, Edn. 4 of his work on the Law of Specific Relief in India.

G.P./R.K.

Appeal dismissed.

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SHAH AND CRUMP, JJ.

Narayan Balaji Nagarkar — Defendant—Appellant.

v.

Kashibai Keshav Dand-Naik—Plaintiff—Respondent.

Appeal No. 9 of 1918, Decided on 9th January 1920, from order of Joint Judge, Poona, in Appeal No. 78 of 1916.

Guardians and Wards Act (8 of 1890), Ss. 35, 36 and 37—S. 35 is no bar to suit by ward against ex-guardian for accounts—Legal representatives of such guardian are liable where minor's estate has come to their hands also.

Section 35 is no bar to a suit by a ward, after the powers of the guardian have ceased and a new guardian has been appointed, against the late guardian for an account of the management, and where the late guardian has died, his representatives are liable to account if it can be established that the property of the minor did go into the hands of the guardian and thence into the hands of his representatives.

[P 167 C 2, P 168 C 1]

J. R. Gharpure—for Appellant.

W. B. Pradhan—for Respondent.

Crump, J.—The question for determination in this case is whether the present suit is barred by reason of anything contained in Ss. 35 and 36, Guardians and Wards Act (8 of 1890).

On 1st October 1900, Keshav, the deceased husband of the plaintiff, was left as the sole surviving male member of his family, and became owner of the family estate. Balaji, father of the defendants, who was Keshav's maternal grandfather, assumed the management, as Keshav was a minor, and on 7th July 1902 he was appointed guardian of the minor's property under the Guardians and Wards Act by the District Court of Poona. He continued to act as guardian up to the death of Keshav in September 1906. After Keshav's death Balaji continued to manage the estate on behalf of the minor plaintiff, and on 26th June 1907 he was appointed guardian of the property by the District Court. Balaji died in July 1907.

In this suit the plaintiff prays for an account for the whole period during which Balaji was in charge of the estate, viz., from 1st October 1900 to the date of his death. That as against Balaji she

would be entitled to an account is not disputed; the sole question is whether she is bound to proceed under the special Act, or whether she has also a remedy apart from that Act. It is necessary in the first place to distinguish as to the capacity in which Balaji was from time to time managing the property:

I. From 1st October 1900 to 17th July 1902 Balaji was not a guardian appointed by the Court.

II. From 17th July 1902 up to Keshav's death in September 1906, he acted as the guardian of Keshav's property duly appointed by the Court, and it is to be observed that he, on 21st July 1902, gave a bond as provided by S. 34 (a) to duly account.

III. From the date of Keshav's death in September 1906 until his appointment as guardian of the minor plaintiff on 26th June 1907 Balaji was again in charge, not as a guardian duly appointed by the Court but in his private capacity.

IV. From 26th June 1907 until his death in July 1907 Balaji was in charge of the estate of the minor plaintiff as her guardian appointed by the Court. He gave no bond to account under S. 34 (a).

In view of the finding of the lower appellate Court it is unnecessary to consider the period after Balaji's death, for it is found that one Godubai, and not the defendants, was in charge of the estate after that event.

It will be observed that the nature of Balaji's connexion with this estate varies from time to time, and his liabilities must depend upon the capacity in which he acted in dealing with the property. That the same individual was in charge throughout is an accidental circumstance which must not be permitted to import confusion. During the first and third periods he was not a guardian appointed under the Act. In the first period there was no appointment and as to the third period his powers as guardian ceased on the death of Keshav. So far as these periods are concerned, it cannot be contended that the Guardians and Wards Act is any bar to the suit. As regards the second and fourth periods there is a further distinction. During the second period he was the duly appointed guardian of the estate of Keshav, and had given an administration bond. During the fourth period he was the duly appointed guardian of the estate of the plaintiff and

had given no such bond. The plaintiff as regards the fourth period is suing the representatives of her guardian. As regards the second period she is suing the representatives of the guardian of her late husband. Though, apart from the special provisions of the Guardians and Wards Act, she is entitled to sue for an account, the distinction has to be kept in mind in considering how far the provisions of the Act may bar a suit. In the one case S. 35 of the Act may be applicable; in the other S. 36.

The effect of S. 37 of the Act clearly is that a suit will not lie against the guardian or his representatives to enforce any remedy provided by Ss. 35 and 36 save as provided in those sections. S. 35 contemplates (i) the assignment of the bond, (ii) a suit on the bond to recover anything due on a breach of the bond. Now the present suit is not based on the bond nor does it seek to enforce the bond and it is not therefore (in my opinion) barred by S. 35. S. 36 deals with a suit instituted by a third person. For such a suit the leave of the Court is required the object being undoubtedly to prevent guardians being improperly harassed by third persons. There is nothing in the section itself to bar a suit by the ward after the powers of the guardian have ceased and a new guardian has been appointed, as is the case here. So far as I understand the object of the Legislature, there is no reason for imputing to it any intention to bar a suit by a duly appointed guardian. In my opinion these sections must be construed strictly and should not be held to bar the right to sue unless that conclusion is unavoidable. I do not think that such a conclusion necessarily follows in this case. That a new guardian can maintain a suit against a previous guardian has been held by the Calcutta High Court in *Kaniz Fatima v. Sajjad Husain* (1), though the arguments urged upon us here were not apparently advanced in the case. For the reasons which I have given those arguments do not appear to me to be valid.

In so far as the suit is against the representatives of the late guardian, if it be established that property of the minor did go into the hands of the guardian, and thence into the hands of his representatives, there seems no sound rea-

(1) [1907] 31 Cal. 211.

son why those representatives should not be liable to account. That is the effect of the lower appellate Court's order and that is, I think, a correct view. It is in consonance with the opinion expressed by the Calcutta High Court in *Maharaj Bahadur Singh v. Basanta Kumar Roy* (2), which appears to me, speaking with due deference, a correct exposition of the law.

I would therefore confirm the order of the lower Court and dismiss this appeal with costs. The cross-objections will also be dismissed with costs.

Shah, J.—I agree. I desire to add that we have considered the decision in *Manmoth Nath Bose Mullick v. Basanto Kumar Bose Mullick* (3), relied upon by Mr. Gharpure in support of the appeal. It is based upon an earlier decision of the Court under Act 40 of 1858 and S. 41, Guardians and Wards Act of 1890. There is no reference to S. 37, Guardians and Wards Act in the judgment. With great deference to the learned Judges, I am unable to accept the view taken in that case. S. 30 saves all remedies open to a ward or his representative against his guardian which are not expressly provided in S. 35 and S. 36. In view of this reservation I do not see how a suit like the present suit can be said to be barred, unless it is shown to be a suit contemplated by either of these sections. I do not think that the present suit is one contemplated by S. 35 in any sense. As regards S. 36, after a careful consideration of the scope and terms of the section, I have come to the conclusion that the section does not apply to a suit filed by a guardian appointed under the Guardians and Wards Act on behalf of his ward against the legal representatives of a deceased guardian of the ward for accounts. As regards S. 41 it is true that the summary remedy contemplated by sub-S. (3) is open to such a guardian. But I do not see how the existence of that summary remedy can be a ground for excluding the ordinary remedy by way of suit. The Calcutta High Court has taken the same view in *Kaniz Fatima v. Sajiad Husain* (1).

In the present case there is no order under S. 48, sub-S. (4), declaring the previous guardian to be discharged. Apparently the deceased guardian is said to

have filed accounts in January 1907 in the District Court. It does not appear clearly as to what happened after the accounts were filed. On the present record nothing is shown to have been done with reference to the accounts said to have been filed by Balaji in January 1907. It is common ground that there is no order of discharge under S. 41 (4).

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 168 Full Bench

MACLEOD, C. J., HEATON AND
KAJIJI, JJ.

In re *Jivanlal Varajrao Desai* and
others—Respondents.

Civil Appln. No. 681 of 1919, Decided
on 15th October 1919.

(a) **Letters Petent (Bombay), Cl. 10 —**
Pleader can be treated in matter of disciplinary jurisdiction.

In the exercise of its disciplinary jurisdiction the High Court can deal with a legal practitioner in the same way as if he were applying for enrolment. [P 170 C 1, 2]

(b) **Bombay Pleaders' Regulation (2 of 1827), S. 56—Term "misbehaviour" is not confined to professional conduct—It may not amount to general infamy or bad character—Signing pledge to disobey Criminal law Bills No. 1 and 2 of 1919 held to be sufficient misbehaviour.**

The term "misbehaviour" in S. 56, Bombay Regn. 2 of 1827, is not restricted to misbehaviour in the strict course of a pleader's professional duties, but includes general misbehaviour. [P 169 C 2, P 170 C 1]

There may be acts which would entitle the High Court to refuse admission to a candidate seeking to be enrolled as a pleader or an advocate, or to consider that it is improper that a pleader or advocate should remain as a practitioner of the Court, although the acts complained of do not involve an imputation of general infamy or bad character. [P 171 C 2]

Where certain legal practitioners* signed the following pledge:

"Being conscientiously of opinion that the Bills known as the Criminal Law (Amendment) Bill 1 of 1919 and the Criminal Law (Emergency Powers) Bill 2 of 1919 are unjust, subversive of the principles of liberty and justice and destructive of the elementary rights of individuals on which the safety of the community as a whole and the State itself is based, we solemnly affirm that in the event of those bills becoming law and until they are withdrawn we shall refuse civilly to obey these laws and such other laws as a committee to be hereafter appointed may think fit, and further affirm that in this struggle we will faithfully follow truth and refrain from violence to life, person or property."

Held: that those who had signed this pledge were not fit persons to be allowed to continue as members of the legal profession. [P 172 C 1]

(2) [1913] 18 I. C. 876.

(3) [1900] 22 All. 332=(1900) A. W. N. 98.

Chimanlal Setalvad, V. Divatia, G. N. Thakor, Ratanlal Ranchhod Das, Jayakar and M. H. Vakil—for Respondents.

Bahaduri and S. S. Patkar—for the Crown.

Macleod, C. J.—A notice was issued by the High Court in its disciplinary jurisdiction on 12th July 1919, against Jivanlal Varajrai Desai and Vallabhaji Jhaverbhai Patel, who are barristers-at-law and advocates of this Court, and Mr. Krishnalal Narsilal Desai, High Court Pleader, at present practising in the Courts at Ahmedabad. The reason for issuing the notice was the receipt of a letter from Mr. Kennedy, the District Judge of Ahmedabad, dated 22nd April 1919, which runs as follows:

"I have the honour to submit for the determination of their Lordships the question of the pleaders of this Court who have signed what is known as the Satyagrahi pledge. The following are the pleaders practising here who have given in their names as members of the Satyagrahi league: Mr. Gopalrao Ramechandra Dabholkar, Mr. Krishnalal Narsilal Desai, High Court Pleader, Mr. Manilal Vallabhram Kothari and Mr. Kalidas Jaskaran Jhaveri. There are others who have not yet given in their names to me.

I had an interview with the above gentlemen on the 16th and expressed my sentiments and elicited theirs. I asked for some sort of satisfactory explanation of the sense in which they took the Satyagrahi oath. They have furnished an explanation which I do not think is satisfactory. I therefore submit the case for orders, as I suppose the question is general to all districts.

As I understand the Satyagrahi oath, it binds the signatories not only to oppose the Rowlatt Bills and cognate legislation, but to break all laws of whatever kind which a committee may decide should be broken. I gather also from the papers that some illegal acts have been already ordained. I cannot myself see that the public adherence to a body which has that rule binding on it, is consistent with the duty of a pleader and the terms of his sanad, and I think the explanation furnished by the pleaders leaves matters much where they are.

I am not in any way impressed by the temporary suspension of the illegal activities of this league. There can be no doubt (at least I have none) that suspension is merely a device to avoid the possibility of punishment falling on the Satyagrahis in respect of acts directly or indirectly due to their teaching and influence, the actual perpetrators of which and the instigators of which are likely to meet with condign punishment.

I am of the belief that the above gentlemen are sincerely and conscientiously under the impression that the Rowlatt Bill legislation is a crime, and as they have that impression, I would not blame them for going to the edge of the law to oppose it. They are all men for whom I have considerable esteem, and I have known them and appreciated them for some years, and it is very painful for me to raise their

case, but I am of the opinion that they are unfit to practise until they have severed their connexion with this league in the same public way in which they have joined it.

There are also at least two barristers who have joined and are prominent members of the local league. Mr. Jivanlal Varajrai Desai and Mr. Vallabhaji Jhaverbhai Patel. But I have no power to deal with them and very likely recent events in Ahmedabad may make it unnecessary to proceed against them. I enclose a copy of the Satyagrahi oath and of the explanation and covering letter of three of the pleaders concerned. No one would be more pleased than myself if it could be found that the explanation was satisfactory. But personally I am of the opinion it is not."

Accompanying the letter were copies of what is known as the "Satyagrahi oath," and letters to the District Judge from Messrs. G. R. Dabholkar, Krishnalal Narsilal Desai, Kalidas Jaskaran Jhaveri and Manilal Vallabhram Kothari, explaining their conduct as the District Judge had requested at an interview with them on the 16th of April. It will be noted that the District Judge did not consider this explanation satisfactory, and that he considered that those four pleaders were unfit to practise until they had severed their connexion with the Satyagrahi league in the same public way in which they had joined it. With regard to Messrs. Jivanlal Varajrai Desai and Vallabhaji Jhaverbhai Patel, Barristers-at-law, who, the Judge stated, had joined and were prominent members of the local league, the Judge said he had no power to deal with them.

This notice was issued under Cl. 10, Letters Patent. A similar notice was also issued on Messrs. G. R. Dabholkar, Manilal Vallabhram Kothari and Kalidas Jaskaran Jhaveri, under Cl. 56 of the Bombay Regulation 2 of 1827. Cause has now been shown by all the respondents, and it has been admitted by Sir Chimanlal Setalvad, who appeared for Messrs. J. V. Desai, G. R. Dabholkar and K. N. Desai, that whether they are to be dealt with under Cl. 10, Letters Patent, or Cl. 56 of the Bombay Regulation 2 of 1827, the same principles are involved.

In the case of *Government Pleader, Bombay v. Annaji Narayan Deshpande* (1) it was held that the term "misbehaviour" under Cl. 56 of the Bombay Regulation 2 of 1827 is not restricted to misbehaviour in the strict course of a pleader's professional duties, but includes

general misbehaviour. And in *Sarbadhi-cary, In re* (2) at p. 45 appears the following passage:

"Their Lordships will not attempt to give a definition of 'reasonable cause,' or to lay down any rule for the interpretation of the Letters Patent in this respect. Every case must depend on its own circumstances. It is obvious that the intention of the Crown was to give a wide discretion to the High Court in India in regard to the exercise of this disciplinary authority."

The powers of a Court in dealing with cases of alleged misconduct against attorneys are described in *Hill, In re* (3). An attorney, while acting as a clerk to a firm of attorneys, in completing the sale of certain property, received the balance of the purchase-money, which he appropriated to his own use. On an application to strike him off the roll, he admitted the misappropriation, and it was held that although the misconduct was not committed strictly in his professional character, yet, as it was misconduct which would have prevented him from being admitted as an attorney, the Court would exercise its summary jurisdiction, and punish the misconduct. Lord Blackburn said:

"But where there is a matter which would subject the person in question to a criminal proceeding, in my opinion, a different principle must be applied. We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors, and we are to look to the character and position of the persons, and judge of the acts committed by them, upon the same principle as if we were considering whether or not a person is fit to become an attorney."

Lord Cockburn said:

"I should add, there is one consideration I omitted, and which, I think is entitled to great weight. It is that put to us in the course of the discussion, namely, that if these facts had been brought to our knowledge upon the application for this gentleman's admission we might have refused to admit him; and I think the fact of his having been admitted does not alter his position; having been admitted we must deal with him as if he were now applying for admission; and as in the case of a person applying for admission as an attorney we should have considered all the circumstances, and either have refused to admit or have suspended the admission for a certain time, so where a person has once been admitted we are bound, although he was not acting in the precise character of an attorney, to take notice of his misconduct."

It is not suggested that the respondents have done anything which would subject them to criminal proceedings,

but that case is sufficient authority for stating that we can deal with the respondents in the same way as if they were now applying for enrolment.

It is necessary therefore to carefully consider the terms of the document known as the Satyagraha oath or pledge which according to the copy sent to us by the District Judge, runs as follows:

"Being conscientiously of opinion that the Bills known as the Criminal Law (amendment) Bill 1 of 1919, and the Criminal Law (Emergency Powers) Bill 2 of 1919 are unjust, subversive of the principles of liberty and justice, and destructive of the elementary rights of individuals on which the safety of the community as a whole and the State itself is based, we solemnly affirm that in the event of these Bills becoming law and until they are withdrawn we shall refuse civilly to obey these laws and such other laws as a committee to be hereafter appointed may think fit, and further affirm that in this struggle we will faithfully follow truth and refrain from violence to life, person or property."

The movement to obtain signatures to this oath commenced in February. I may say at once that no one can reasonably object to the right of a citizen to express his opinion as to the merits or demerits of a legislative measure proposed to be adopted by the Government and, if he is opposed to it, to take every means to induce Government to withdraw it, provided he keeps within the bounds imposed by established law. The signatories to the oath have expressed their objection to these Bills, which came to be known as the Rowlatt Bills, and affirmed that they would civilly refuse to obey them if they became law. "Civilly" according to the dictionary "means in a polite manner; politely." It is suggested that civil or polite disobedience is the same as what is known as passive resistance. That is not so. Passive resistance connotes complete inaction in the presence of a command of law, that is to say, the refusal to do what the law commands, while disobedience includes the doing of something which is forbidden by law. Whether the disobedience is active or passive depends on the nature of the law which it is intended to disobey.

Now we are concerned in this matter with the conduct of the respondents not as citizens but as advocates and pleaders.

We have nothing to do with their political views, nor have we anything to do with expressions of opinion on their part, however strong against any particular measure proposed by the legislature. But a public declaration made by an ad-

(2) [1907] 29 All. 95=34 I. A. 41=4 A. L. J. 34=9 Bom. L. R. 9=11 C. W. N. 273=17 M. L. J. 74 (P. C.).

(3) [1868] 3 Q. B. 543=9 B. & S. 481=37 L. J. Q. B. 295=18 L. T. 564=16 W. R. 1061.

vocate or a pleader that he has bound himself civilly to disobey any laws which a committee to be thereafter appointed might think fit, appears to me to go very much further than a mere expression of opinion as to the merits of a Bill proposed by a legislature. I take it for the purpose of the argument that the respondents, as Mr. Kennedy believes, were sincerely and conscientiously under the impression that the Rowlatt Bill legislation was a crime, and that they honestly thought that signing the Satyagraha pledge would be a constitutional form of agitation against the passing of the Rowlatt Bills.

But I have to consider whether the signing of such a pledge is consistent with the duties which they owe as officers of this Court. Advocates and pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice, for which they are entitled to be paid, to those members of the public who require their services. Their position, training and practice give them immense influence with the public and their example must necessarily have a much greater effect, whether for good or for evil, than the example of those who do not occupy this privileged position. It is not necessary in order for us to be able to exercise our jurisdiction that any offence should have been committed, nor is it necessary that what the respondents have done should have subjected them to anything like general infamy or imputation of bad character. The case of *Wallace, In re* (4) was relied on by the respondents. But I do not think that Lord Westbury in giving judgment went so far as to say that an act to render an attorney remaining in the Court as a practitioner improper must necessarily be an act committing an attorney to anything like general infamy or an imputations of bad character. That was an appeal from a decision of a Canadian Court, and as regards the respondent in the case proceedings of a different nature could have been taken against him for the act complained of. Under the Letters Patent and the regulation each case must be decided on its own fact, as

their Lordships of the Privy Council said in *Sarvadhicary's* case (2) and in my opinion there may be acts which would entitle us to refuse admission to a candidate seeking to be enrolled as a pleader or an advocate, or to consider that it was improper that a pleader or advocate should remain as a practitioner of the Court, although the acts complained of do not involve an imputation of general infamy or bad character. This pledge, however can be said to involve, if not directly, certainly indirectly, the professional character and reputation of the respondents. The duty as pleaders and advocates under their sanads is to advise their clients to the best of their abilities as to what the law is, not as to what the law should be in their opinion. But it would be impossible for them to keep their duties to the league separate from their professional duties. This conflict would become the more pronounced if any of the respondents had occasion to advise his client regarding one of the laws denounced by the league.

Sir Chimanlal was asked whether his clients would be able to give advice conscientiously to their clients without being influenced by their pledge, and Sir Chimanlal replied that they would give advice as lawyers conscientiously and not as Satyagrahis. He was bound to say that, but the atmosphere of this Court before which his clients have been arraigned, is somewhat different to the atmosphere of their consulting chambers in Ahmedabad. Supposing for instance the committee had denounced the Income tax Act, the respondents would be bound by their pledge to refuse to fill in the schedules sent to them for the purpose of assessment. If a client consulted one of them regarding the way in which the schedule should be filled in he would be on the horns of a dilemma. Every member of the league of this description is of necessity a propagandist. To arrive at the desired end as many adherents must be gathered in as possible, no opportunity of doing so must be lost. It would therefore be the respondent's duty as a Satyagrahi to persuade the client to disobey the law; it would be his duty as an officer of the Court to tell the client to obey.

It cannot be doubted for a moment that it is extremely undesirable that any of those who hold sanads as advocates

(4) [1866] 1 P. O. 283=4 Moore P. O. (n. s.) 140=36 L. J. P. O. 9=15 W. R. 533=16 E. R. 269 (P. O.).

or pleaders of this Court should find themselves involved in this conflict of duty. Then there is the danger of their example being followed by persons who do not possess that high moral character, that love for the truth, that abhorrence of all ideas of violence to life, person or property possessed by the respondents. It would appear on the face of it that the signatory to the pledge abdicates all independent judgment in favour of an unknown body of his fellow signatories. I am told that if the committee referred to in the pledge called upon the signatories in pursuance of their pledge to do acts repugnant to the respondents' feelings, they would not act in accordance with their pledge. If that is the case, the signing of the pledge would not involve any obligation on the part of the signatories to act according to the pledge and if a signatory considers himself entitled to form his own opinion whether he should follow the lead of the committee or not, it follows that the pledge is worthless and he would much better not have signed it. But the public can only judge men by their actions, and the more ignorant and less educated of the public who sign the pledge and see the names of other signatories are not acquainted with the mental reservations of their fellow signatories. A very sound principle to remember is that those who live by the law should keep the law. I should certainly be disinclined to grant a sanad of this Court to anyone who I knew was a signatory to this pledge, for I should not consider him a proper person to be enrolled in that privileged class referred to above. That being so I should be inclined to say under the powers given us by the Charter and the Regulation that a person who had signed this pledge was not a fit person to be allowed to continue amongst that privileged class.

Turning now to the letters of explanation given by the pleader-respondents to the District Judge, I am not surprised at his expressing the opinion that they were not satisfactory. It must be remembered that those letters were written a few days after the lamentable riots on 10th and 11th April at Ahmedabad, and though I do not for a moment suggest that any of the respondents took any part either directly or indirectly in those riots, it is a matter of common

knowledge that there had been several meetings attended by thousands of mill-hands during March and the first ten days of April which were summoned by the leaders of the Satyagraha Sabha. Whether those meetings had any connexion with the subsequent riots was a question which was not discussed during the course of the arguments, but it has already been the subject of judicial decision. The District Judge considered he had no power to deal with the barrister respondents; so the record contains no letter of explanation from them. Mr. J. V. Desai however has put in an affidavit at the last moment, a proceeding which cannot be commended considering that the hearing of these notices has twice been adjourned for the convenience of the respondents, while Mr. V. J. Patel with wiser discretion, has contented himself by being represented before us by Mr. G. N. Thakore who supported the argument of Sir Chimanlal.

There is no need to deal with Mr. Desai's affidavit. It is sufficient to say that it does him no credit.

I have refrained from dealing with many points contained in the argument of counsel for the respondents, which concern rather the politician than the Judge, and are therefore always open to controversy. The plain issue is what are the duties of the respondents to this Court.

I have waited in vain for any acknowledgment on the part of the respondents that they have realized, in the events which have happened that however harmless and constitutional they may have considered this movement when it was started, it is absolutely incompatible with their duties as lawyers to the High Court that they should continue to take part in it.

Sir Chimanlal did indeed say that it might be that the Satyagraha movement would receive its quietus. He hoped and trusted that it had received its final quietus now. That no doubt was his own personal opinion, but is there any trace on the record that that was also the opinion of respondents?

Sir Chimanlal also said it was open to the signatories to withdraw from the pledge. Then why does not he advise his clients to do so now?

I wish to make it perfectly clear that apart from all other considerations,

those who are enrolled as advocates and pleaders of this High Court or of the District Courts cannot serve two masters. It may be that after due consideration of this expression of our opinion the respondents may see the force of it. We have no desire to deal harshly with them, and for the present we shall content ourselves with giving them this warning. We do so because we are told that the Satyagraha Sabha, since the riots of April, has been quiescent. Whether we shall take any further action depends entirely on the development; if any, of the Satyagraha movement so that these notices will be adjourned with leave to the Advocate-General and the respondents to move for their restoration to the Board should occasion arise.

In connexion with these notices there has been a regrettable incident of which we are bound to take notice. An application was made to this Court by some of the respondents or their pleaders for copies of Mr. Kennedy's letter. Copies were furnished and considering that the respondents were lawyers, it did not appear necessary to inform them that such copies were given to them for their private information and not for publication. That letter was published before the case came on for hearing in Court. Who is responsible for what we must regard as a very grave breach of a well-recognized rule we cannot say. We are quite sure the legal advisers of the respondents are free from blame; if the respondent or respondents who published the letter do not give in his or their names to the Registrar, the blame must for the present rest on all the respondents.

Heaton, J. —I concur generally in the judgment just delivered by my Lord the Chief Justice and I concur in the order proposed by him. There are however a few words of my own to add. One of the legal gentlemen concerned in these proceedings in dealing, in an affidavit, with the Rowlatt legislation and the Satyagraha movement wrote as follows:

"I believe that it is the inherent right of a citizen to protest against such legislation by such constitutional methods and I have merely acted on that bona fide belief."

Of the rights of ordinary citizens however little need be said, for we are not dealing with the case of ordinary citi-

zens. Our notices were issued against professional lawyers, and it is with them and with them only that we are concerned. They belong to a privileged class and they enjoy their privileges with our consent. But just as they enjoy special privileges, so they are under peculiar obligations. Moreover, this Court is under special obligations in regard to them. Just as it licenses or permits them to practise as lawyers, so it is bound to see that they do not flagrantly abuse their privileges.

I will first deal with their obligations to clients. We not unnaturally asked what advice would a professional lawyer, who had taken the Satyagraha pledge, give to a client who asked him whether as a citizen he ought to obey one of those laws which as a lawyer he was pledged civilly to disobey. If the lawyer's answer were that, to quote the words of the pledge:

"the law was unjust, subversive of the principles of liberty and justice and destructive of the elementary rights of individuals"

and ought to be disobeyed, then a position would arise which we could not but consider reflected very unfavourably on the lawyer's performance of his professional duty. For, it is as much the lawyer's duty in dealing with his client to act on the law as it is, not as he would have it be, as it is the duty of a Judge to do the same.

We were however most positively assured by counsel who appeared for the respondents that this would not happen. In other words, we are told that though as citizens the respondents would unhesitatingly assert that certain laws ought not to be obeyed; yet they would, as professional lawyers, advise their clients that those same laws had to be obeyed. It may be so; but the temptation to tell the client that the law should be disobeyed would at least be severe, and would place them in a position which no conscientious lawyer ought to occupy.

I will now turn to the duty of professional lawyers to this Court and to the law. They are bound, as I have said, to act according to the law as it is, not as they would have it be. Criticism of the law, even severe criticism, is permitted even to Judges, much more so perhaps to professional lawyers. Nevertheless it is a matter of conscience with both, that they are to recognize and give effect to

the law. We must assume that professionally the respondents would obey all the laws; but as they have taken a pledge, as citizens, to disobey certain laws, their position is just as unsatisfactory in relation to this Court and to the law as it is in relation to their clients.

It seems to me that professional lawyers cannot fulfil both the obligations of the Satyagraha pledge and the obligations of their profession. They are pledged to follow the truth, but this they cannot consistently do if they disobey certain laws as citizens whilst as lawyers they obey and advise obedience to those same laws.

It has been necessary to say all this, as I gather that the respondents are blind to the fact that there is anything unsatisfactory or unbecoming in their attitude. They are under the impression that their position as professional lawyers is correct. But to me it seems to be essentially incorrect.

Suppose we were dealing with those who desired to become professional lawyers and who applied to us for enrolment on our list of advocates or for sanads to practise as pleaders. Should we grant the applications? I greatly doubt it. At any rate until the applicants had given definite undertakings that they would limit their political activities, not merely so as not to interfere with, but so as not to excite suspicion as to the correctness of their professional conduct.

The attitude which the respondents have adopted is to my mind undeniably embarrassing and unseemly from a professional point of view. But need we anticipate that anything worse will follow? That we cannot say. It depends on the development of the Satyagraha movement with which the respondents have intimately associated themselves.

Kajiji, J.—I have had the advantage of reading the judgments of my Lord the Chief Justice and my brother Heaton and I concur in the order proposed and have nothing to add.

G.P./R.K.

Respondents warned.

*** A. I. R. 1920 Bombay 174**

MACLEOD, C. J. AND HEATON, J.

In re *Kalidas J. Jhaveri* — Respondent.

Appellate Civil; Decided on 10th November 1919.

*** Contempt of Court—Pending proceedings are privileged and cannot be published.**

All proceedings in cases pending before a Court of justice are privileged and they must not be published until the case comes on for hearing before the Court. [P 175 C 1]

Judgment. — Mr. Jhaveri, a pleader practising at Ahmedbad, was one of the respondents against whom notices were recently issued in consequence of a letter which was addressed to the Registrar of the High Court by Mr. Kennedy, the District Judge of Ahmedabad. After the notices had been served the respondents asked for inspection of Mr. Kennedy's letter and they were allowed to receive copies of that letter. I should have thought that any pleader ought to have known that it was contrary to the rules of the profession, and contrary to the duty which he owed to this Court, to show that letter to any outsider, or give copies of that letter to any outsider. The respondent, Mr. Jhaveri, obtained a copy of this letter, which I may remark, was a private letter written by the District Judge to the Registrar, and therefore the private property of the Court until the proceedings had become public. Mr. Jhaveri handed a copy of that letter to Mr. Gandhi, who he knew was the Editor of "Young India." Mr. Gandhi published that letter in his paper, and also commented on it. It is quite true that Mr. Jhaveri had nothing to do with that. But he must have known that when he handed the letter to a journalist, that journalist would make such use as he thought proper of that letter, subject to the rules which he considered governed the publication of such matters by journalists. In his letter of explanation to the Court, Mr. Jhaveri writes that he saw no impropriety in handing the letter to Mr. Gandhi. He neither brought about its publication, nor did he prevent it. After what has passed to-day between Mr. Jhaveri and the Court, we trust that he will now see that it was most improper on his part to have handed that letter to Mr. Gandhi. He might have shown it to Mr. Gandhi as a leader of the Satyagraha movement in order to take his advice. But if he did so, he ought to have

especially stipulated that it was shown to Mr. Gandhi as his private adviser, and not as a journalist, and he should have specially prohibited Mr. Gandhi from making any use of that letter as a journalist. It is certainly strange that the respondent should not have seen the impropriety of his action. He has told us that it is not unusual in the mufassil for papers placed on the file in certain proceedings to be published before the proceedings are made public in Court. If that is the practice in the mufassil, the sooner it is stopped the better. All proceedings in cases pending before a Court of justice are privileged, and they must not be published until the case comes on for hearing before the Court. It is certainly desirable that pleaders who go out to practise in the districts should feel that they continue to be under the restraining influence of the leading members of the profession practising in Bombay.

I am quite sure that nothing of this sort would ever have occurred in Bombay, and Mr. Jhaveri, if he consults any of the learned pleaders who are sitting in Court, will be told that he had no business whatever to have given a copy of this letter to a person in Mr. Gandhi's position, unless he took precautions that it should not be published until the notices were heard in Court. Such conduct was particularly disgraceful in this matter because the proceedings were between Mr. Jhaveri and the Court itself in which the Court was dealing with his sanad which might have been suspended or taken away from him, and therefore he should have been all the more careful not to do anything in the course of the proceedings which might have given the Court further cause for dealing with his sanad. However we think now that this expression of opinion on our part should be a lesson to Mr. Jhaveri in the future, and ought to be notice to other practitioners in the mufassil of what we consider is the proper course to follow in such cases, and therefore we content ourselves in this case with severely reprimanding Mr. Jhaveri. As I said at the commencement, I am very glad that he has had the courage to confess that he was the respondent who committed this breach of privilege. He has thereby saved the other respondents the trouble of coming to Bombay, as they would

have to do, if he had not written to the Registrar, for it was necessary that what we thought about this matter should be said in open Court.

G.P./R.K.

Order accordingly.

A. I. R. 1920 Bombay 175 Full Bench

MARTEN, HAYWARD AND KAJIJI, JJ.

In re Mohandas Karamchand Gandhi and another—Respondents.

Criminal Appln. No. 449 of 1919, Decided on 12th March 1920.

Contempt—Comments on or extracts from pending proceedings cannot be published without leave of Court—Such publication amounts to interference and is contempt of Court—High Court should protect mufassil Courts in proper cases.

It is not permissible to publish comments on or extracts from any pending proceedings in a Court unless the leave of the Court is first obtained.

Any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court.

It is a contempt to publish any part of the record of a case while proceedings are pending. The High Court has power to protect Courts of inferior jurisdiction and in proper cases it should extend its protection to Courts in the Mufassil over which it exercises supervision.

A District Judge wrote a letter to the Registrar of the High Court submitting for determination the question whether certain conduct of some of the legal practitioners practising in the District Judge's Court, was consistent with their duties as advocates and pleaders. The respondents, who were the editor and publisher of a newspaper, printed the District Judge's letter in their newspaper together with their own comments while the proceedings were pending before the High Court; [P 178 C 1]

Held: that the respondents were guilty of contempt of Court.

Strangman and Bahadurji—for Respondents.

Marten, J.—The respondents Mohandas Karamchand Gandhi and Mahadev Haribhai Desai are the editor and publisher respectively of a newspaper called Young India. They are charged with contempt of Court in publishing in that newspaper, on 6th August 1919, a letter dated 22nd April 1929 and written by the District Judge of Ahmedabad (Mr. B. O. Kennedy) to the Registrar of this Court, and also with publishing comments on that letter. The gist of the charge is that the letter in question was a private official letter forming part of certain proceedings then pending in this Court, and that the comments which the respondents made

in their newspaper were comments on that pending case.

The facts are not in dispute and may be stated briefly. The case which I have referred to is *Jivanlal Varajrai Desai, In re* (1). It arose under the disciplinary jurisdiction of this Court, in consequence of the above letter from the District Judge, whereby he submitted for the determination of this Court the question of the pleaders of the Ahmedabad Court who had signed what is known as the "Satyagraha pledge," whereby they undertook (amongst other things)

"to refuse civilly to obey these laws, (viz., the Rowlatt Act) and such other laws as a committee to be hereafter appointed may think fit."

The learned District Judge also mentioned the names of two barristers who had signed the pledge. The point was whether that pledge was consistent with their duties as advocates and pleaders. The result of that letter was that notices were issued by this Court, on 12th July 1919, against the advocates and pleaders in question, and it was eventually held, on 15th October 1919, by a Bench of this Court consisting of my Lord the Chief Justice and Heaton, J., and Kajiji, J., that the Satyagraha pledge which these advocates and pleaders had taken was not consistent with the performance of their duties as such to the Court and the public.

Meanwhile, viz. on 6th August 1919, the present respondents had published the letter in question in *Young India*, and made there the comments complained of. They had obtained the letter in this way. For the purposes of the defence to the charge, a copy of the District Judge's letter had been supplied by the High Court to Jivanlal V. Desai, one of the counsel in question. He gave a copy to another respondent, Kalidas J. Jhaveri, and the latter handed it to the Editor of *Young India*, who is reputed to be the author of the Satyagraha pledge. For his conduct in so doing, Kalidas J. Jhaveri was severely reprimanded by the Chief Justice and Heaton, J., on 10th November 1919: see *Kalidas J. Jhaveri, In re* (2).

I may now turn to the newspaper itself.

On p. 1 under the heading "O'Dwyerism in Ahmedabad," the District Judge's

letter to this Court is set out in full. On p. 2 there is a leading article headed "Shaking Civil Resisters." We have read the whole of it and I need only refer to some of its more salient features. At the outset, it mentions an alleged declaration by Sir Michael O'Dwyer of his intention of taking note of the anti-Rowlatt legislation, agitation and passive resistance demonstration before there was any disturbance of the peace. It then states that Sir Michael had succeeded to an eminent degree in disturbing the peace in the Punjab and that "the O'Dwyerian spirit" had travelled to Burma. Then follows a comment on the Local Government there. The article then proceeds to say that an echo of the spirit is heard nearer Bombay, and mentions the above High Court notice to the Ahmedabad lawyers, and that it was prompted by the above letter from the District Judge, and that it remains to be seen what action will be taken by the High Court when the case is argued before it.

The article then states that the District Judge has prejudged the issue: that he has made an impudent suggestion which is then quoted: that the adjective, "impudent" is used advisedly; that his imputation would be ungentlemanly in a stranger and is unpardonable in his case. The article then suggests that the last paragraph of the letter means that the two barristers would be charged and convicted by the Special Bench, and that it was not the fault of the District Judge that they had not been so charged, and that the District Judge had made up his mind that they had committed a criminal breach of the law of the land. Then, in the concluding portion, the article states that these traducers of civil resistance and civil resisters are becoming the instruments for propagating Bolshevism, i. e., the spirit of lawlessness accompanied with violence, and that the Government of Burma, the Government of the Punjab and the District Judge of Ahmedabad, are all, in their own way, endeavouring forcibly to impose their will upon civil resisters, but that those who are trying to crush the spirit of civil resistance are but fanning the fire of Bolshevism. It will be noticed that this article shows, on the face of it, that the proceedings were then sub judice, and that it nowhere mentions

(1) A. I. R. 1920 Bom. 168=44 Bom. 418=54 I. C. 679.

(2) A. I. R. 1920 Bom. 174=44 Bom. 443=58 I. C. 462.

Mr. Kennedy's name, but refers to him throughout as the District Judge of Ahmedabad.

After the proceedings against the pleaders had been disposed of the Editor of Young India was asked, on 18th October 1919, to give an explanation regarding the publication of the letter and the above comments. Certain correspondence thereupon passed between him and the Registrar of this Court acting under the directions of the Chief Justice. We have read all this correspondence, and I need not repeat it in full. In his letter of 22nd October the respondent, Gandhi, wrote:

"In my humble opinion, I was within the rights of a journalist in publishing the letter in question and making comments thereon. I believed the letter to be of great public importance and one that called for public criticism."

The reply of 31st October was that this could not be regarded as a satisfactory explanation, but that the Chief Justice was willing to concede that the editor was unaware that he was exceeding the privilege of a journalist, provided he would publish in Young India an apology in the form therewith enclosed.

On 7th November the respondent, Gandhi, telegraphed that he was referring the matter to counsel.

On 11th December, the Acting Advocate General initiated the present proceedings by applying for a rule nisi against the respondents. This application was granted by Shah and Crump, JJ. on that day, but the rule itself was not actually issued till 19th December, and it bears the latter date. Meanwhile, a further letter, dated 11th December, had been received from the respondent Gandhi. The writer expressed his inability to publish the suggested apology, and stated that in publishing and commenting on the letter, he had performed a useful public duty at a time when there was great tension and when even the judiciary was being affected by the popular prejudice, but that he had had no desire whatsoever to prejudice the issues which their Lordships had had to decide. Then, after referring to the honour of journalism and to his membership of the Bombay Bar and its traditions, the writer stated that, in similar circumstances, he would not act differently, and that he could not consciously offer any apology and that, if that explanation

was not considered sufficient, he would respectfully suffer the penalty.

Subsequently, at the respondents' request, the hearing of the rule was postponed, and on 27th February 1920 they made the following statements:

The respondent Gandhi stated:

"With reference to the rule nisi issued against me I beg to state as follows: Before the issue of the rule certain correspondence passed between the Registrar of the Honourable Court and myself. On 11th December I addressed to the Registrar a letter which sufficiently explains my conduct. I therefore attach a copy of the same letter. I regret that I have not found it possible to accept the advice given by his Lordship the Chief Justice. Moreover, I have been unable to accept the advice because I do not consider that I have committed either a legal or a moral breach by publishing Mr. Kennedy's letter or by commenting on the contents thereof. I am sure that this Honourable Court would not want me to tender an apology unless it be sincere and express regret for an action which I have held to be the privilege and duty of a journalist. I shall therefore cheerfully and respectfully accept the punishment that this Honourable Court may be pleased to impose upon me for the vindication of the majesty of the law.

"I wish to say, with reference to the notice served on Mr. Mahadeo Desai, the publisher, that he published it simply upon my request and advice."

The respondent Desai stated:

"With reference to the rule nisi served upon me, I beg to state that I have read the statement made by the Editor of Young India and associate myself with the reasoning adopted by him in justification of his action. I shall, therefore cheerfully and respectfully abide by any penalty that this Honourable Court may be pleased to inflict on me."

At the hearing before us both the respondents appeared in person. The respondent Gandhi stated (inter alia) that he did not want to go beyond the above statements already made by him; that he would accept any ruling of law laid down by this Court, and that, while submitting he had not committed any contempt of Court, he did not want to argue the point. The respondent Desai stated that he associated himself with his co-respondent.

As to the general principles of law to be applied to this case, there can, I think be no doubt. Speaking generally, it is not permissible to publish comments on or extracts from any pending proceedings in this Court, unless the leave of the Court be first obtained. Many good reasons may be advanced for this, but the underlying principle is, I think, that of

the due administration of justice for the public benefit, one incident of which demands that, as a matter of common fairness, both parties shall be heard at the same time and in the presence of each other on proper evidence by an independent and unprejudiced tribunal. That object would be frustrated if newspapers were free to comment on or to make extracts from proceedings which were still sub judice. It matters not whether those comments and extracts favour prosecutor or accused, plaintiff or defendant. The vice is the interference with what is the Court's duty and not a newspaper's, viz., the decision of the pending case.

In *Rex v. Parke* (3) Wills, J., in delivering the judgment of the Court (the other members of which were Lord Alverstone and Channell, J.) said at pp. 436-7 as follows:

"The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression 'contempt of Court.'"

In *Rex v. Davies* (4) Wills, J., again delivered the judgment of the Court. At p. 40 the learned Judge says:

"What then is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders? It will be found to be not the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired."

Lower down, on the same page, the learned Judge refers with approval to an undelivered judgment of Wilmut, C. J., in 1765, which showed that

"the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone."

So, too, in *Helmore v. Smith* (5) Lord Justice Bowen says:

(3) [1903] 2 K. B. 432=72 L. J. K. B. 839=89 L. T. 439=52 W. R. 215=67 J. P. 421=19 T. L. R. 627.

(4) [1906] 1 K. B. 32=75 L. J. K. B. 104=93 L. T. 772=54 W. R. 107=22 T. L. R. 97.

(5) [1886] 35 Ch. D. 449=56 L. J. Ch. 145=56 L. T. 72=35 W. R. 157.

"The object of the discipline enforced by the Court in case of contempt of Court is not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice."

In *Reg v. Gray* (6) Lord Russell of Killowen, in speaking of one class of contempt said at p 40:

"Any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Court, is a contempt of Court."

Within that class fall comments on pending proceedings, and also, I think, premature publication of documents. Earlier on the same page, the Lord Chief Justice had dealt with another class of contempt which he thus describes:

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court."

Within this class comes the personal scurrilous abuse of a Judge as a Judge, which was the case the Court there had to deal with. It was this class of contempt which Lord Hardwicke characterized in 1742 as "scandalising a Court or a Judge." Speaking for myself, I do not think that that expression is a happy one as it is open to misconstruction, and I doubt whether it is much used by modern lawyers. At any rate, I personally prefer Lord Russell's own description of this particular class of contempt.

It makes no difference, I think, that the alleged abuse here was of a District, and not of a High Court, Judge. *Rex v. Davies* (4) shows that in England the High Court has power to protect the Courts of inferior jurisdiction and that in a proper case it should do so. I think the same power exists in India, and that, subject to the precautions which Lord Russell mentions on pp. 40 and 41, this Court should extend its protection to all Courts in the mufassil, over which it exercises its supervision.

As regards the premature publication of documents, the law is thus stated in Oswald on Contempt, Edn. 3, p. 95:

"Printing, even without comments and circulating the brief pleadings, petition, or evidence of one side only, is a contempt."

So, too, in Halsbury's Laws of England, Vol. 7, p. 287, it is stated:

"It is a contempt to publish copies of the pleadings or evidence in a cause, while proceedings are pending."

(6) [1900] 2 Q. B. 36=69 L. J. Q. B. 502=82 L. T. 534=48 W. R. 474=64 J. P. 484=16 T. L. R. 305.

For these propositions, cases beginning from 1754 are cited and they include instances of affidavits, winding-up petitions, and statements of claim, which latter correspond to complaints in this country. One can easily see the evils which would arise if it were permissible to publish a complaint containing (say) charges of fraud against some respectable man before he could even put in his answer, and long before the charges could be judicially determined.

I may refer to one more case, not because it lays down any new law, but because it brings the English authorities down to date, and illustrates the restrictions imposed there on the liberty of the press, which, as pointed out by Lord Russell in *Reg v. Gray* (6), is in these matters "no greater and no less than the liberty of every subject of the King." The case is *Rex v. Empire News Limited* (7) and was heard by the Lord Chief Justice of England and Avory, J., and Sankey, J. There the newspaper had commented on a pending murder case, but did not attempt to justify its action in so doing, and the proprietors and editor expressed their deepest regret and contrition to the Court. In delivering judgment, the Earl of Reading said :

"The Court could not permit the investigation of murder to be taken out of the hands of the proper authorities and to be carried on by newspapers. The liberty of the individual, even when he was suspected of crime and indeed even more so when he was charged with crime, must be protected and it was the function of that Court to prevent the publication of articles which were likely to cause prejudice. The only doubt in the case was whether the Court ought to commit the editor to prison.

"The Court had come to the conclusion that, in the circumstances, it must mark its sense of the offence committed, which was an offence both by the proprietors and editor, by imposing a fine of £1000."

The principles of law then being clear, how ought they to be applied to the facts of this particular case? In my judgment those principles prohibited the publication of the District Judge's letter pending the hearing of the notices issued by the High Court. It was contended by the respondent, Gandhi, that that letter was written by Mr. Kennedy in his private capacity, and not as District Judge. I think that contention is erroneous. The letter is an official letter written by the District Judge in the exer-

cise of his duties as such, and submitting the case to the High Court for orders. As my brother Hayward, J., has pointed out to me, the letter follows the procedure laid down in the Civil Circulars of this Court in cases of alleged misconduct by a pleader: see p. 259. It very properly sets out what the learned Judge considers to be the facts both for and against the pleaders, and gives his reasons for bringing the matter before the High Court. Indeed, if he had not done so, he would presumably have been asked by the High Court for further particulars before they took any action. The letter is on lines quite familiar to this Court in other cases where the Sessions Judge in the exercise of his duties as such brings some matter before this Court with a view to the exercise of its exceptional powers. I may instance criminal references where the Sessions Judge, for the reasons given in his official letter, recommends the revision of some illegal or inadequate sentence which has been passed by a Subordinate Court and which the High Court alone can alter in certain contingencies. If, in the present case, the District Judge's letter contained any statements, which the respondent pleaders or barristers contended were inaccurate, that would be a matter for decision at the hearing of the notices, when all they had to say would be fully considered.

But even if the letter was written by Mr. Kennedy in his private capacity, I do not think it would make any substantial difference as regards mere publication. The letter would still form part, and a most important part, of the pending proceedings and the record thereof, and I do not think that any substantial difference can be drawn between it and the other classes of documents mentioned in the authorities cited in Oswald and in Halsbury to which I have already referred.

In my judgment therefore the publication of this letter was a contempt of Court.

That brings me to the comments made in the newspaper, including the heading "O'Dwyerism in Ahmedabad" under which the letter was published. These comments are not only comments on pending proceedings, but are of a particularly intemperate and reprehensible character. They prejudice the case and tend to under-

(7) [1920] The London Times, dated 20th January 1920.

mine any decision which the High Court may come to at the trial. They also amount, in my opinion, to what Lord Russell describes as "scurrilous abuse of the Judge as such." In this latter connexion the question whether the letter was written by Mr. Kennedy in his private or in his judicial capacity becomes material, but, as I have already stated, it was, in my judgment, written in his judicial capacity.

Accordingly, on the authorities which I have already referred to, these comments are clearly a contempt of Court and come within both the classes to which Lord Russell refers, and in my judgment they constitute a serious contempt of Court.

We have carefully considered the various statements made by the respondents, and invited them at the hearing to give any intelligible explanation or excuse for their conduct. None such was forthcoming. In his letter of 11th December 1919 the respondent, Gandhi, contends that in publishing and commenting on the letter he

"performed a useful public duty at a time when there was great tension and when even the judiciary was being affected by the popular prejudice."

Common sense would answer that if that tension and popular prejudice existed it would be increased rather than diminished by abuse of the local Judge and that that could not be the public duty of any good citizen.

But there would seem to be some strange misconceptions in the minds of the respondents as to the legitimate liberties of a journalist. Otherwise the respondent Gandhi could hardly have contended before us—as he in fact did—that if a son brought a suit against a father, and if a journalist thought that the son's action was wrong, the journalist would be justified in holding the son up to public ridicule in the public press, notwithstanding that the suit was still undecided. I need hardly say that this contention is quite erroneous. It may however be that principles which are quite familiar in England are imperfectly known or understood in India, and that the respondents have paid more attention to the liberty of the press than to the duties which accompany that and every other liberty.

This has much weighed with me in

considering what order the Court ought to pass in this case. We have large powers and, in appropriate cases, can commit offenders to prison for such period as we think fit and can impose fines of such amount as we may judge right. But just as our powers are large, so ought we, I think, to use them with discretion and with moderation remembering that the only object we have in view is to enforce the due administration of justice for the public benefit.

In the present case the Court has very seriously considered whether it ought not to impose a substantial fine on one, if not both, of the respondents. But, on the whole, I think it sufficient for the Court to state the law in terms which I hope will leave no room for doubt in the future, and to confine our order to severely reprimanding the respondents and cautioning them both as to their future conduct. That accordingly is the order I think we should pass in the present case.

Hayward, J.—I concur. A contempt of Court was, in my opinion, committed in the mere publication of the letter of Mr. Kennedy before the trial of the matter by this Court. It might not have been realized, but the reason for the rule has been explained by my brother Marten and shown to rest on numerous precedents quoted under para. 615 at p. 287, Vol. 7 of Halsbury's Laws of England.

A contempt of Court of a more serious nature was, in my opinion, committed in commenting in the particular manner on that letter. It amounted clearly to "scandalizing" Mr. Kennedy as District Judge within the dicta of Lord Hardwicke quoted by Lord Russell in *Reg v. Gray* (6). It was Mr. Kennedy's duty, according to established practice, to report the matter in question as District Judge for the orders of the High Court. It was, in my opinion, his duty under the general powers of superintendence vested in him as District Judge under S. 9, Bombay Civil Courts Act, 1869, and the duty was, moreover, expressly prescribed as follows:

"The Judge who notices the misconduct of the pleader should charge the pleader therewith, and, after such preliminary inquiry as he may think fit to make, should write to the Registrar requesting him to lay the charge before the Honourable the Chief Justice and Judges, who, if necessary, will call on the pleader for any further explanation he may wish to make. The Judges will then consider the whole matter in chambers, after which the matter will be

determined by a Chamber resolution or, where necessary, by formal proceedings in Court: para. 14, Ch. 18, at p. 259, Civil Circulars Manual of the High Court."

It has therefore become our duty to protect the proceedings of the District Judge under the powers shown by the precedents of *Rex v. Parke* (3) and *Rex v. Davies* (4) to be vested in us as Judges of the High Court.

A contempt of Court of an even more serious nature was, in my opinion, further committed, in that the comments tended to interfere with a fair trial and to prejudice public justice. They tended to substitute what has been termed a newspaper trial for the regular proceedings before the established tribunal, the High Court. The precedents for the position include those already quoted as well as the later cases of *Higgins v. Richards* (8) and *Rex v. Empire News Limited* (7), quoted by brother Marten. The respondents have not denied the facts nor seriously disputed the law. They have expressed their readiness in their replies to submit to whatever punishment might be imposed on them for what they have termed "the vindication of the majesty of the law" by the High Court.

It is difficult to appreciate the position taken up by the respondents. They have expressed their inability to apologize formally but have, at the same time, represented their readiness to submit to any punishment meted out to them. It is probable that the editor, the respondent Gandhi, did not realize that he was breaking the law and there would be no doubt, if that were so, that it was not realized by his publisher, the respondent Desai. The respondents seem to have posed not as law-breakers, but rather as passive resisters of the law. It would therefore be sufficient, in my opinion, to enunciate unmistakably for them the law in these matters, to severely reprimand them for their proceedings and to warn them of the penalties imposable by the High Court.

Kajiji, J.—I concur.

Per Curiam.—The order of the Court will therefore be:

"The Court finds the charges proved; it severely reprimands the respondents and cautions them both as to their future conduct."

G.P./R.K. *Respondents reprimanded.*

A. I. R. 1920 Bombay 181

MACLEOD, C. J.

Rustamji A. Dubash—Plaintiff.

v.

Haji Hussein Lari and others—Defendants.

Original Suit No. 161 of 1919, Decided on 14th June 1919.

(a) Vendor and Purchaser—Damages—Breach of contract—Defence—Party cancelling contract without justification has no defence in suit for damages.

If a buyer cancels the contract without any justification, he disables himself from setting up any defence which he might otherwise have done to an action for damages. [P 182 C 1]

(b) Contract—C. I. F.—In C. I. F. contracts property in goods passes to buyer immediately on shipping—Subsequent buyers from original buyer obtain it after bills of lading are endorsed.

As regards a C. I. F. contract as between the buyer and the person importing the goods, the property in the goods passes when the goods are shipped, but when the first buyer sells to another party the property in the goods does not pass until the bills of lading are endorsed to the purchaser. [P 182 C 2]

Campbell and Kanga—for Plaintiff.

Setalvad and Desai—for Defendants.

Judgment.—On 6th September 1918 a contract was entered into between the plaintiff and the defendants for the purchase by the defendant of ten bales of Liepmanns' White Shirtings No. 1500, each bale containing 50 pieces, at Rs. 35 per piece, C. I. F. Bombay, shipment September 1918. Terms and conditions as per plaintiff's purchase from Messrs. Girdharidas Radhakisandas on further terms and conditions of Messrs. Volkart Bros' contract freight in excess of 78 Sh. per ton and war risk insurance over 5 1/2 cent to be borne by the purchaser.

It appears that, on 21st August, the plaintiffs had bought 30 bales of these Shirtings from Girdharidas, and on 22nd August they bought 25 bales of similar Shirtings from Messrs. E. D. Sassoon & Co.

On 13th November plaintiff received from E. D. Sassoon & Co., an invoice for ten bales of the contract goods. Notice was given to the plaintiff that the steamer had already arrived and that the goods were lying at the docks at the plaintiff's risk.

The goods were shipped on or about 17th September, as is shown by the bill of lading in favour of Messrs. Volkart Bros., and the steamer arrived about 18th October. But, as was often the case during the war, the shipping documents

did not arrive till a later date sometime in the beginning of November.

On 25th November the plaintiff sent an invoice for ten bales to the defendant and, immediately after that, they received a notice from the defendant which is dated 23rd November:

"We purchased from you Liepmanns, White Shirtings No. 1500, we hereby cancel the same as they were for September shipment and even now November is ending."

The defendants contend that they were entitled to cancel the contract, but there was no justification for their doing so. The obvious reason which made them cancel was the fall in the market. It was their duty to demand delivery and it was only on a refusal by the plaintiffs, to fulfil their part of the contract, that the defendants would be entitled, to cancel it. But it has been suggested, and has now been ascertained as a fact, that the plaintiff was not in a position to deliver, in performance of his contract, goods which he had purchased from Girdharidas. He in his turn had a dispute with Girdharidas in October, which no doubt was due to the fact that he had only succeeded in selling ten bales out of of the 55 which he had purchased in August.

That however would not help the defendant, as *Braithwaite v. Foreign Hardwood Co.* (1) is an authority for the proposition, that if a buyer, without any justification, cancels the contract, he disables himself from setting up any defence which he might otherwise have done to an action for damages. In that case, the contract was for the sale of rosewood, for shipment in 1903, to be delivered at Hull in instalments during that year, cash payable against bills of lading. When the first consignment of rosewood was on the sea, the buyers repudiated the contract and refused to accept any rosewood. Afterwards, it came to their knowledge that a portion of the rosewood in the first consignment did not answer to the description of the quality of the rosewood in the contract. It was held that as the original repudiation by the buyers was wrongful, the buyers had waived the performance of conditions precedent on the part of the sellers who were entitled to damages based upon the difference between the contract price of

the rosewood and the price at which it had been sold against the contract.

I do not think therefore it is open to the defendants to take the point that the plaintiffs were not in a position to tender documents for ten bales of goods which they had bought from Girdharidas. I do not think, in any event, the point would be a good one, as I do not think the plaintiff guaranteed or warranted in his contract that he would deliver bales which he had purchased from Girdharidas and none other, so that the defendants would be entitled to refuse taking delivery of exactly similar bales which, as a matter of fact, had been purchased by the plaintiff from another party. All that the contract of 6th September said was, that the contract bales were sold to the defendants on the same terms as he had bought bales from Girdharidas, taken in conjunction with the conditions of the contract between Girdharidas and Messrs. Volkart Bros.

The plaintiffs have sued for the price of the goods or, in the alternative, for damages. If the property in the goods had passed to the defendants, then the plaintiffs could sue for the price. But, although as regards the C. I. F. contract between the buyer and the person importing the goods the property would pass when the goods were shipped, I do not think the property would again pass when the first purchaser sold to another party and again, whenever a subsequent sale took place, unless the bills of lading were endorsed to each successive purchaser.

I think therefore the plaintiffs are entitled to damages, and it is admitted that the market rate for these goods C. I. F. at the date of the breach was Rs. 22. The plaintiffs are therefore entitled to a decree for Rs. 6,683, with costs and interest on judgment at 6 per cent.

G.P./R.K.

Suit decreed.

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HEATON AND MARTEN, JJ.

Tribhovandas Narottamdas—Plaintiffs
—Appellants.

v.

Nagindas Vijbhukandas—Defendants
—Respondents.

Original Civil Appeal No. 42 of 1919,
Decided on 19th September 1919, from
decision of Macleod, C. J. in Suit No. 149
of 1918.

(1) [1905] 2 K. B. 543=74 L. J. K. B. 688=92
L. T. 637=10 Com. Cas. 189=10 Asp. M.
C. 52=21 T. L. R. 413.

Contract—Construction—(Per *Heaton, J.*)
—Contract to sell particular kind of goods
—Contract held could not be construed to mean that specific goods were to be delivered or on failure damages would be payable—(Per *Marten, J.*) **—Condition precedent not having been fulfilled neither party held bound by contract.**

In September 1917 plaintiffs agreed to buy and defendants agreed to sell certain goods and entered into a contract. The material clause of the contract was as follows: "Ghaghrapat (cloth) cases or bales 19 'Gin' at Re. 0-10-3, inches 34. The above mentioned goods which are to arrive are sold (to you.) These purchased by us from Graham & Co. are sold to you. Shipment thereof January or February. And there are (to be) two to three months in addition. To be delivered early if arrive early. To be delivered as and when the same may be received. To be delivered on the safe arrival of the steamer. Interest (at) eight annas. 'Sai' (allowance) (at) Rs. 2 per case. If the goods to arrive come 'late' the purchaser is to take delivery of the same." The goods which were eventually received by the defendants from Graham & Co. were not of the description which the plaintiffs had agreed to buy. The plaintiffs refused to accept the goods and sued the defendants for damages.

Held: (per *Heaton, J.*)—That having regard to the commercial situation in September 1917 it must be presumed that the parties intended that the defendants should offer to the plaintiffs 19 bales out of those which Graham & Co. were sending to them; and that the bales should be as near the description stated in the contract as possible that the contract might also have contemplated that if the plaintiffs were quite justly dissatisfied with a tender of goods on the ground that the goods were nowhere near the description contained in the contract, then they might repudiate the bargain altogether, but that neither of the parties could have contemplated that there should follow on a repudiation of that kind any right on the part of the plaintiffs to recover damages. [P 184 C 2]

Per *Marten, J.*—What was sold were ginned goods, what arrived were unginned goods and therefore the condition precedent of the contract viz., the arrival of ginned goods, not having been fulfilled, neither party was bound by the contract. [P 186 C 2]

Per *Curiam*—that the plaintiffs' suit must therefore be dismissed. [P 186 C 2]

Coltman—for Appellants.

Taraporewalla—for Respondents.

Heaton, J.—The plaintiff agreed to buy and the defendants to sell certain goods and entered into a contract. The important part of the contract (I will leave out the earlier part with its usual preliminaries) is:

"Ghaghrapat (cloth) cases or bales 19 'Gin' at Re. 0-10-3, inches 34. The above mentioned goods which are to arrive are sold (to you). Those purchased by us from Graham & Co. are sold to you. Shipment thereof January or February. And there are (to be) two to three months in addition. To be delivered early if arrive early. To be delivered as and when the

same may be received. To be delivered on the safe arrival of the steamer. Interest (at) eight annas. 'Sai' (allowance) (at) Rs. 2 per case. Fresh clause: If the goods to arrive come 'late' the purchaser is to take (delivery) of the same.";

The case has never been separately tried and we have been dealing with it on the pleadings, the correspondence which ensued between the parties and the contract itself, the important part of which I have just read out. The contract was made on 15th September 1917. In July of the following year, i. e., 1918 correspondence between the parties began. It appears that by that time certain goods had been shipped by Graham & Co. to the defendants and it was known to the defendants that the goods were not by any means exactly of the description given in the contract. A sample was sent by the defendants to the plaintiffs, and the defendants suggested that an allowance should be made that the plaintiffs should take the goods with an allowance. This the plaintiffs declined to agree to on the ground, that the goods which were thus offered them, were not the goods they had contracted to take. Subsequently the goods arrived. The plaintiffs refused to take delivery of them, and now they have brought this suit, claiming that the defendants have broken the contract and are liable to pay damages.

Independently of any evidence at all, we may take certain things for granted, because it is inconceivable that this contract could have been entered into if those things did not exist. One is that the plaintiffs and the defendants in connexion with the contract must have discussed the quality of the goods they were bargaining about and must have discussed, or at any rate, the matter must have been mentioned, the kind of goods the defendants had bought from Graham & Co. and which it was anticipated Graham & Co. would send them. Another thing we may take to be undoubted is that the goods to which the correspondence referred and the goods which actually arrived in the end were the goods the defendants had bought from Graham & Co. and were the goods which the defendants had in mind when they entered into this contract with the plaintiffs and were the goods which the defendants represented to the plaintiffs, and the plaintiffs believed, to be

the goods that they were contracting to buy. Having assumed as much as this, it remains to interpret the contract. We do not know actually what was the contract between the defendants and Graham & Co. nor do we know what passed between them in the way of correspondence or what shipping documents there were. They have not been put in. We merely have to construe the contract in the light of its own words and the circumstances that have been mentioned. It does not help us that both the parties have at different times attributed quite different meanings to the contract, and in the case which has been argued before us they do not seem, especially the defendants, to rely on the meaning which they originally gave to the contract. This certainly is rather to be regretted, when we remember that the contract is supposed to express the intention of those who are parties to it and if those who are parties to it are either so unwilling to disclose their true intention or so uncertain about it that they cannot be consistent in the intentions they assert, there must be some little difficulty in arriving at the real meaning. Undoubtedly that is so. We have to make the best we can of the material before us.

The position however when reached is simple, though it may be difficult to arrive at it. If there was an absolute contract for sale, or if there was an absolute contract for sale subject to one condition, which was that the goods which the defendants had bought from Graham & Co. should arrive then the plaintiffs are entitled to say :

" You agreed to sell us certain goods. Every condition provided for has been fulfilled. But you have not given us the goods. "

In that case they would be entitled to damages. But if the contract was not a contract absolute for sale but was based on a mutual understanding that the goods which were to be offered to the plaintiffs were the goods which Graham & Co. were to send to the defendants, then if the plaintiffs refuse to receive the goods, though they may be perfectly right in so doing, they are not entitled to damages, because everything contemplated between the parties has then been fulfilled. It would be possible to occupy a very considerable amount of time by analyzing the contract sentence by sentence but

I am reluctant to do that ; and I think I can express my conclusion sufficiently clearly, perhaps more clearly, without doing it. The contract is not one in common form. It was a contract entered into to meet very peculiar circumstances. Those circumstances were the commercial circumstances of September of the year 1917 and the commerce with which we are concerned was a commerce between England and India. It is therefore necessary to recall that in September 1917 England was only emerging from the most severe period of submarine peril and that the effects of the war on commerce, manufacture and trade generally had reached, although not the highest pitch of inconvenience, a very high pitch of inconvenience indeed. It is only necessary to remember these things to understand that traders, if they were, as they are supposed to be, sensible men, would make their terms, with a full understanding of the extraordinary risks involved in bringing to completion the arrangements they embarked upon. Like the Judge, the present Chief Justice who tried the case on the judgment in which this particular case was settled I feel quite certain that no sensible commercial man could at that period have entered into a contract of the nature the plaintiffs ascribe to this particular one. It seems to me and on this point I really do not feel a shadow of a doubt, that what the parties intended, what they both had in contemplation, and what they intended the written contract to show, was an intention that the defendants should offer to the plaintiffs nineteen bales out of those which Graham & Co. were sending to them; and that the bales should be as near the description stated in the contract as possible. I dare say the contract contemplated that if the plaintiffs were quite justly dissatisfied with a tender of goods on the ground that the goods were nowhere near the description contained in the contract, then they might repudiate the bargain altogether. But I feel perfectly certain that neither of the parties ever contemplated for a moment that there should follow, on a repudiation of that kind, any right on the part of the plaintiffs to recover damages.

This opinion I have reached on a very careful consideration of the words of the contract and of the uncertainties they

so clearly imply, in the light of the known circumstance of the time.

I think the appeal should be dismissed with costs.

Marten, J.—This is an appeal in substance, though not in form, from the judgment of my Lord Chief Justice in Suit No. 15 of 1919. The decision is in the nature of a demurrer, that is to say, that admitting all the facts stated in the plaint the plaintiffs are not entitled to recover the damages they claim. The formal issue, which is not in the paper book but which was No. 1 (a) in Suit No. 15 of 1919, and which by agreement between the parties in the Court below was also to be raised in the present case, is as follows:

"Whether on a proper construction of the contract the plaintiffs are entitled to any damages in the event of the goods contracted for failing to arrive."

The particular contract sued on in this case is not in the paper book, that is to say, the official translation is not in the paper book. We have an official translation of the contract in the other suit but not in this one. However it was in evidence in the Court below, and we have obtained for our own use a copy of this official translation.

Now, it is quite clear that the goods contracted to be sold were ginned goods. The goods which have been tendered to the defendants are unginned goods. The plaintiffs plead in effect that these were not the contract goods. They say in para. 3:

"The defendants having failed to deliver the contract goods and having insisted upon the plaintiffs accepting goods different to the contract goods."

Then that is treated as a breach of contract for which the plaintiffs claim damages. The decision of the learned Judge in Suit No. 15 is that if that is so then the condition precedent in this contract, viz., the arrival of the goods, was never fulfilled and therefore the contract was at an end.

The point therefore which arises for our decision is: Was the arrival in Bombay of ginned goods of this description a condition precedent of the contract.

Before passing to the contract, I will say that at the trial of the action it suited neither party to take this point. The plaintiffs wanted damages. The defendants, on the other hand, wanted the

plaintiffs to accept the goods with an allowance of Re. 1-6-0, the goods admittedly being off sample. At the trial they agreed that the case was governed by the decision in Suit No. 15 and that a decree for the defendants should be taken accordingly. In effect therefore the decision of the learned Judge was that they were both wrong, and that the contract was at an end.

Now, there are several expressions in this contract which may import words of contingency. The expressions are: "Goods which are to arrive," "to be delivered as and when the same may be received," "to be delivered on the safe arrival of the steamer," and "if the goods to arrive come late the purchaser is to take delivery of the same." On the somewhat similar contract that he had before him the view of the learned Chief Justice was as follows:

"It seems to me that the only construction that can be put on these words is that they mean that the seller has contracted that he will only give delivery when the goods do arrive and that if the goods did not arrive at all, then he could not give delivery and there would be no liability put upon him to pay damages for their non-arrival. That seems to me to be the plain grammatical sense of those words. And, as a matter of fact, I cannot imagine any person who had indented for goods from England or any other part of the world abroad contracting in any other form, considering the numerous chances there then were of the non-arrival of the goods within the stipulated period; supposing the ship had been sunk, is it conceivable that under the contract the plaintiffs could have claimed damages?"

In the present case there is an additional clause which was not in the contract in Suit No. 15 and which apparently was not brought to the attention of the learned Judge. I refer to the words "to be delivered on the safe arrival of the steamer." Having regard to those words, the case of *Hale v. Rawson* (1) might afford some argument that the contingency, the parties had in view, was the safe arrival of the steamer and not merely the safe arrival of the goods. It was put to counsel for the appellants whether he contended that the contract was in all events an absolute one. He admitted, and I think he was bound to make that admission, that at any rate the contract was contingent on the safe arrival of the steamer. It was then put

(1) [1858] 27 L. J. O. P. (n. s.) 189=4 O. B. (n. s.) 85=4 Jur. (n. s.) 963=6 W. R. 339=140 E. R. 1018=81 L. T. (o. s.) 59=114 R. R. 692.

to him: Supposing the goods were never shipped in England, what then? Counsel answered that as then advised it would probably be that the vendor in that event would not be liable for the goods, because, as counsel said, you cannot tell about the arrival of the steamer until the goods are shipped on the steamer. If you get to that point, it seems to me that it is only a comparatively small step to go from the case where no goods are shipped to the case where goods of a different description from the contract are shipped. It is not a case here of ginned goods, say slightly damaged by sea-water, or some bales damaged by sea-water, being tendered. It was the case of ginned goods and unginned goods and the amount of the allowance that the defendants were willing to give shows the substantial difference between these two classes of goods.

Personally, on the construction alone, I respectfully agree with what the Chief Justice has stated in Case No. 15 of 1919, and I think that what he there stated applies to the present case.

Now, this being my opinion on the construction of the contract apart from authority, is there any authority which prevents my taking that view? I think not, and that on the contrary such authority as there is tends to support the above view. This type of contract—I may describe it as a “goods to arrive contract”—came into operation in Bombay to a large extent during the war. It may have arisen because of the great desire to get goods of any description and at any time from England. Contracts in this form have given rise, so far as I am aware, to a great deal of trouble in Bombay, and it is not surprising to find that there is really very little authority on this class of contracts. I can only express the hope that the Bombay merchants will modify this type of contract and will with the aid of counsel and their Merchants’ Associations settle some common form of contract which will be free from the ambiguities which have led to the present and other litigation.

Turning then to such authority as one can find, perhaps the nearest statement on the point is that in Halsbury’s Laws of England, Vol. 25, p. 144. There it is stated in note (q):

“Where there is a contract for the sale of goods to arrive, or “on arrival,” in the absence

of terms creating such a warranty, the seller does not warrant the arrival of the goods, but the contract is on both sides contingent on their arrival, and when a particular ship is named, contingent both on the arrival of the ship in the ordinary course, and within the time stated, if any, and on the goods being on board, where there is a warranty that the goods are in a particular ship, the contract is subject to the single contingency of the arrival of the ship.”

There are a considerable number of cases there referred to, but I think counsels agree that there is no case precisely on all fours with the one we have to deal with.

Then, in Benjamin on Sale, Ed. 5, pp. 586 and 587, it is stated as follows:

“It appears from this review of the decisions that contracts of this character may be classified as follows:

“1. Where the language is that goods are sold “on arrival per ship A. or ex ship A” or “to arrive per ship A. or ex ship A.” (for these two expressions mean precisely the same thing), it imports a double condition precedent, viz., that the ship named shall arrive, and that the goods sold shall be on board on her arrival.

“2. The language of the contract may, however show that the words “arrival” or “to arrive” are used only in connexion with the goods. In such a case this is only a single condition precedent, viz., the arrival of the goods. And semble that “to be shipped,” or “on shipment per A on arrival,” or “arrive,” import such a single condition.”

Then No. 5:

“Where the sale describes the expected cargo to be of a particular description, as “400 tons Aracan Neerensie rice,” and the cargo turns out on arrival to be rice of a different description, the condition precedent is not fulfilled, and neither party is bound by the bargain.”

It seems to me that the fifth proposition comes rather close to the present case. What were sold were admittedly ginned goods. What arrived were a different description, viz., unginned goods. According to the passage just cited, the result is that neither party is bound by the bargain.

After giving my best consideration to this case, I am of opinion that the judgment in the Court below was correct, and that this appeal ought to be dismissed with costs.

There is one point I should mention to show it has not been overlooked. The ground on which the defendant succeeded was not expressly pleaded; but, I think, having regard to the issues which were raised by agreement, that it must be taken that all such amendments were made in the pleadings as were necessary for the determination of the issue on

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which the case was decided, viz. No. 1.A.

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Appeal dismissed.

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HEATON AND MARTEN, JJ.

Hurnandrai Fulchand and others—
Plaintiffs—Appellants.

v.

*Pragdas Budhsen and others—*Defendants—Respondents.

Original Civil Appeal No. 52 of 1919, Decided on 17th November 1919, from decision of Macleod, C. J., in Original Suit No. 273 of 1919.

Contract Act (9 of 1872), S. 56—Contract to deliver certain number of bales—Supply by mill implied—Mill not producing that quantity—Foundation of contract disappearing neither party held liable for breach.

Defendants undertook to supply a certain number of bales of dhoties manufactured by the Bradbury Mills to the plaintiffs. The agreement after setting out the details proceeded to say: "The goods under manufacture are sold. The same are to be taken delivery of as and when the same may be received from the mills. Delivery is to be caused to be given in full by the 31st of December in the year 1918." The mills failed to supply the full number of bales to the defendants, who consequently could not supply them to the plaintiffs. The latter sued the defendants to recover damages for breach of contract.

Held: that the basis or foundation of the contract was the anticipation, common to both parties, that the mills would supply the goods to the vendors, and that the goods not having been supplied by the mills, the foundation of the contract disappeared, and neither party had any claim against the other for damages.

[P 188 C 1]

Jinnah and Desai—for Appellants.

Kanga and Campbell—for Respondents.

Heaton, J.—In this case the plaintiffs sued to recover damages for the breach of a contract. The contract was an undertaking by the defendants to supply a certain number of bales of dhoties manufactured by the Bradbury Mills on or before the 31st December of the year 1918. The defendants supplied a certain number, but they did not supply the number contracted for. The plaintiffs therefore sued for damages for failure of the defendants to supply the full number.

The trial Court gave them a certain amount of damages on the ground that the defendants had failed to supply a certain number of bales which they ought to have supplied; but it refused a part of the damages claimed on the ground that in the circumstances of the case the contract was not to be interpreted as an

absolute undertaking to supply the whole number contracted for.

On this the plaintiffs have appealed and they claim the full amount of the damages which they claimed in their plaint. They say the contract was an absolute contract to sell them the goods described.

The defendants, who are respondents, maintain that it became or was a conditional contract.

The appeal turns really on that point. If the contract was conditional, as the defendants maintain, the decree of the trial Court is correct. If it was an absolute contract, as the appellants maintain then they are entitled to the full amount of damages.

The contract is in writing. It sets out all the details, the number of bales and so forth; and then it proceeds to say:

"The goods under manufacture are sold. The same are to be taken delivery of as and when the same may be received from the mills. Delivery is to be caused to be given in full by the 31st of December in the year 1918."

The question really resolves itself into this: Was this a contract by which the defendants undertook to supply the goods whether they received them from the Mills or not, or was it a contract which both the parties to it understood was based on the assumption that the goods would be supplied by the mills, the foundation of the contract being that the goods if supplied by the mills were to be delivered by the defendants to the plaintiffs? The trial Court has taken the latter view. There is no doubt that the goods sold were goods to be manufactured or in process of being manufactured by the Bradbury Mills, a mill in Bombay. This is not the case of a vendor who undertakes absolutely to supply goods which he will obtain somehow or somewhere in the open market. It is a contract to supply goods of a particular kind which he has to obtain from a particular mill.

Now, one way of looking at the case is to ask oneself whether it was probable that a businessman would absolutely contract to deliver these goods of a particular kind made by a particular mill, whether he could obtain them from the mill or not. Looked at from that point of view, I think the probabilities are that a sensible businessman would not undertake to deliver goods of that kind, whether he was able to obtain them from the

mill or not. That way of looking at the case inclines one to the view taken by the trial Judge.

Another way of looking at it is to take the words of the contract themselves and see how the subject-matter of the contract is described. The word used to describe the goods is the word "bunto," which may be translated in a variety of ways; but it is admitted that it means "goods that have not yet at any rate fully come into existence," "goods that remain to be manufactured or which are only partly manufactured." That is what is the subject-matter of this contract. The underlying idea, seeing that the goods are so described, is quite clearly to my mind this: that the goods sold are goods which the vendor will receive from the Bradbury Mills. And I should describe the basis or foundation of the contract as the anticipation—an anticipation common to both the parties to the contract—that the mills would supply the goods to the vendor. So regarded, it follows that if the goods are not supplied to the vendor, the foundation of the contract disappears. Neither party therefore has any claim against the other for damages.

I may mention here that it was not argued in appeal that the plaintiffs had any claim against the defendants on account of negligence. Their claim in appeal was not based on an allegation that the defendants, had they been more active or more careful, could have obtained more goods from the mills than they did obtain. The finding of the lower Court was that the defendants were not in default in that particular. That is to say they had obtained from the mills such goods as they could reasonably obtain, and their failure to deliver the goods to the plaintiffs was due to the fact that the mills had not supplied them to the vendors, the defendants, and that conclusion was not attacked by counsel who appeared for the appellants in his opening address.

Now, having arrived at this conclusion as a matter of fact it seems to me that on that set of facts the law is comparatively simple. We have been referred to a number of cases and they take us back to an early case, that of *Taylor v. Caldwell* (1). The judgment in that case

deals as a matter of principle with the question of implied conditions and contingent as contrasted with absolute contracts. In the judgment there occur these words:

"In none of these cases (i. e., certain cases which had been referred to) is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the music hall at the time when the concerts were to be given, that being essential to their performance."

That case dealt with a contract which could not be performed because a music hall had been destroyed by fire. The underlying idea however is that if the basis or foundation of the contract has disappeared neither party can claim performance from the other. And this principle has been re-stated in very much those words in a number of later cases. I think I cannot do better than quote another sentence from the same case of *Taylor v. Caldwell* (1):

"There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition."

I do not myself doubt for a moment that business men in Bombay, if they were called upon to express an opinion on this particular contract with which we are dealing, would say that the contract is based on the anticipation that the mills would deliver the goods to the vendors; and that, if the anticipation was disappointed, the vendors were not bound to give the goods to the purchasers.

I think therefore that the decision of the trial Court is correct and that the appeal should be dismissed with costs.

The cross-objections have not been pressed, and they also should be dismissed with costs.

Marten, J.—The question in this appeal is whether the suit contract was an absolute contract of sale by the defendants, or whether it was contingent on the goods in question being manufactured and supplied by the mills. The more material words are:

(1) [1863] 3 B. & S. 826=32 L. J. Q. B. 164=8 L. T. 356=11 W. R. 726=122 E. R. 309=129 R. R. 573.

"Delivery by the 31st December 1918. Goods to be manufactured (bunto) are sold. The same are to be taken delivery of as and when the same may be received from the mills."

Another translation of the word "bunto" is "goods under manufacture." The parties themselves have not expressly provided for the event which has happened, viz., non-manufacture by the mills of the greater portion of the goods.

Now, dealing with the matter generally so as what one would expect from reasonable businessmen, the learned trial Judge says:

"But it is difficult to suppose that any prudent man contracting for the delivery of goods to be manufactured at the date of the contract in the future by a third party would contract to sell those goods absolutely.

And when one considers the nature of the contract which the defendants had with the mills, one finds that it was not an absolute but a determinable contract. Under Cl. 4 of their contract (Ex. 1) the mills were entitled to cancel the contract or the remaining portion if the mills met with any accident or obstruction or if for any other reason the mills could not give in full the goods mentioned in the contract or any portion thereof, and in that event the defendants were not to get any compensation whatever. Then, there was another clause that in case of strike, stoppage of machinery, or such unforeseen circumstance (sic) the mills did not undertake to give regular deliveries in terms of the contract.

Now, that being so, why should the defendants, who had not got an absolute contract themselves, contract to sell the goods absolutely? On the other hand, from the purchasers' point of view, and for the matter of that from the vendors' too, the third parties who were to manufacture the goods were well-known mills in Bombay. Both parties might therefore reasonably consider that the mills would carry out their obligations honourably, and that if those obligations were not carried out it would be for some good and valid reason and not from any improper motive, and that accordingly a conditional contract would be fair to both the plaintiffs and defendants. Further, the mill contract (Ex. 1) is mainly a printed form. There is not any direct evidence that the plaintiffs were familiar with it, but I think it a reasonable inference under S. 114, Evidence Act, that

large buyers like the plaintiffs of 864 bales would know the usual selling conditions of the mills, or at any rate know that the mills did not guarantee delivery in all events. The probabilities therefore seem to me that the parties to the suit contract would contract on the basis of its being conditional on the manufacture of the goods, and not on the basis that the vendor would warrant the manufacture by the mills. I think this particularly applies in time of war with its numerous uncertainties, and as regards this, there may be noticed the very long time for delivery which was allowed in the suit contract.

But we must decide this case not on probabilities, but on the contract the parties have actually entered into, for it was open to them to contract as they pleased. Before I pass on, there are some words in the contract which perhaps I should notice here. Ex. 3 and Ex. B. are different translations of the same contract, viz., that handed by the defendants as vendors to the plaintiffs as purchasers. The words are "Delivery is to be caused to be given in full by 31st of December" in Ex. 2 and "delivery is to be completed on or before 31st December" in Ex. B. Then in the counterpart, Ex. A, signed by the plaintiffs the words are "Delivery by 31st December." Now, standing by themselves, there may be different shades of meaning between the words "delivery to be caused to be given in full by . . ." and "delivery is to be completed on or before . . ." and delivery by . . ., but I think these words have to be read with the rest of the contract. That being so, their meaning is "delivery of goods which are to be manufactured or are under manufacture."

Now taking the words "goods to be manufactured," they indicate that the parties are dealing with something which is to be brought into existence in the future by a third party. That seems to me more consistent with the contract being conditional on that expectation being realized, rather than on one party warranting it shall be realized. Similarly, the expression "goods under manufacture" implies that the goods are not yet manufactured—at any rate wholly. So, too, the stipulation that the goods are to be taken delivery of "as and when the same may be received from the mills" would

rather point to the contract being conditional on that receipt.

We have been referred to no authority either in the Contract Act or in any decided case which is precisely in point on the facts; but I think useful analogies may be drawn from other typical cases. One class of cases is referred to by the learned trial Judge, viz., the "goods to arrive" cases, which were dealt with by this Court quite recently in *Tribhovan-das v. Nagindas* (2). I will not repeat what is said there by my learned brother and myself, but the authorities there cited tend to show that speaking generally in the case of goods to arrive from a third party, there is no warranty implied by the vendor that the goods will arrive: see Halsbury Laws of England, Vol. 25, p. 144, note (q) and Benjamin on Sale, 5th Edn. p. 586. Why, then, in the case of goods to be manufactured by a third party should there be a warranty by the vendor that the goods will be manufactured?

Then, we were referred to *Taylor v. Caldwell* (1) which was frequently cited in the Coronation Procession cases. As regards that case Vaughan Williams, L. J., in *Krell v. Henry* (3) says at p. 754:

"It is not essential to the application of the principle of *Taylor v. Caldwell* (1) that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time."

In the present case I think anybody would say that the existence of the "manufactured goods" was essential to the performance of the suit contract.

Then in *Tamplin Steamship Company v. Anglo-Mexican Petroleum Products Company* (4) Lord Loreburn dealt with the case of *Horlock v. Beal* (5) in which *Taylor v. Caldwell* (1) was cited with approval, and he says at p. 403:

"An examination of these decisions confirms me in the view that when our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance

has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

Lower down he says :

"That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them they would have taken their chance of them or such that as sensible men they would have said 'if that happens of course it is all over between us?' What in fact was the true meaning of the contract? Since the parties have not provided for the contingency, ought a Court to say it is obvious they would have treated the thing as at an end?"

If it is necessary so to do I think one may fairly imply a condition here that the goods were to be manufactured and supplied by the mills: and that if that condition was not fulfilled, both parties were to be released quoad those un-manufactured goods.

It is argued for the plaintiffs that the only object of stating that the goods were to be manufactured was to distinguish them from ready goods, and to entitle the vendor to deliver the goods by instalments as received from the mills, which but for this stipulation he would not be entitled to do. This may have been one object, but in my opinion it was not the only object. This still leaves one with this, viz., that both parties contemplated that the goods would be received from the mills—an event which in fact did not happen. There is therefore some resemblance between the present case and *Howell v. Coupland* (6), where both parties anticipated that a crop of potatoes would be grown on defendant's land but in fact most of it perished from disease without default on the part of the defendant. Then the defendant was held excused by reason of his being prevented by causes for which he was not answerable: per James, L. J., at p. 262.

(2) A. I. R. 1920 Bom. 182=54 I. C. 233.

(3) [1903] 2 K. B. 740=72 L. J. K. B. 794=89 L. T. 328=52 W. R. 246=19 T. L. R. 711.

(4) [1916] 2 A. C. 397=85 L. J. K. B. 1339=115 L. T. 315=21 Com. Cas. 299=32 T. L. R. 677.

(5) [1916] 1 A. C. 486=85 L. J. K. B. 602=114 L. T. 193=21 Com. Cas. 201=60 S. J. 236=32 T. L. R. 251.

(6) [1876] 1 Q. B. D. 258=46 L. J. Q. B. 147=33 L. T. 832=24 W. R. 470.

In the result, I am of opinion that on the true construction of the suit contract and having regard to the surrounding circumstances the vendor did not warrant the manufacture and supply by the mills of the goods in question, and that accordingly the decision of the Court below is correct.

I should add that there is no question here of the vendor being in default with the mills, or having put it out of his power to give delivery of the suit goods. It is unnecessary therefore to consider whether an obligation on his part should be implied not at any rate wilfully to prevent fulfilment of the suit contract: see *Hamlyn v. Wood* (7). We are not dealing with the case of a dishonest vendor who deliberately breaks his contract with the mills. If anybody is in default, it is the mills and not the vendor. But the fact appears to be that the mills could not give delivery because a large proportion of their looms were engaged on Government contracts.

Accordingly I agree that the appeal should be dismissed and that the cross-objections should be dismissed in both cases with costs.

G.P./R.K.

Appeal dismissed.

(7) [1891] 2 Q. B. 468=60 L. J. Q. B. 784=65 L. T. 286=40 W. R. 24.

A. I. R. 1920 Bombay 191

MACLEOD, C. J. AND FAWCETT, J.

Lal Chand Sakharam Marwadi—Defendant—Appellant.

v.

Khandu Kedu Ughade—Plaintiff—Respondent.

Appeal No. 46 of 1918, Decided on 30th July 1920, from order of First Class Sub-Judge, Nasik, in Appeal No. 75 of 1917.

Transfer of Property Act (4 of 1882), Ss. 60 and 101 — One co-mortgagor registered occupant—Transfer by him of equity of redemption to mortgagee does not extinguish others' right to redeem.

The mere fact that one of several co-mortgagors is the registered occupant of the mortgaged land does not entitle him to transfer the portions of the equity of redemption belonging to his co-mortgagors. Any such transfer in favour of the mortgagee does not operate to extinguish the right of the co-mortgagors to redeem their shares in the mortgaged land.

[P 192 C 1]

Nadkarni and A. G. Desai—for Appellant.

W. B. Pradhan—for Respondent.

Macleod, C. J.—The plaintiffs sued for accounts under the Dekkhan Agri-

culturists' Relief Act and for redemption of a mortgage. The first nine plaintiffs were the descendants of four brothers who passed the original mortgage in 1869. I do not know why the other plaintiffs were made parties, for the descendants of four other brothers by the same father have no interest whatever in the mortgaged property. In 1879 Mahadu, one of the first set of four brothers, executed a rajinama in his capacity of registered occupant of the mortgaged property in favour of Government, and the mortgagee executed a corresponding kabuliyat. Since then the mortgagee has been in occupation of the mortgaged land. The mortgage-bond was restored to Mahadu with an endorsement that it had been satisfied. The question is, whether the equity of redemption which existed in favour of the remaining three brothers continued and whether it still continues in favour of their descendants. The really important issue is Issue 3 in the first appeal: Had the mortgagors other than Mahadu consented to and authorized the latter's rajinama? That was found in the negative. The corresponding issue in the trial Court was, whether the rajinama and kabuliyat were competent to extinguish the right of redemption of the mortgagors and pass title to the defendants. That was found in the affirmative. Accordingly, the trial Judge dismissed the plaintiff's suit. The argument seemed to be that, because Mahadu, the registered occupant, executed the rajinama the interest not only of Mahadu but also of his brothers in the land passed. But I think that the learned appellate Judge looked at the case from the right point of view when he considered whether the interest of the other brothers was conveyed or transferred when Mahadu executed the rajinama, unless it could be shown by positive evidence that they had consented to give up their rights to redeem the mortgage. The learned Judge says:

"There is nothing in these documents, that is to say, the rajinama and kabuliyat, to show that the three mortgagors had given up their rights to the land in dispute. There is nothing to show that they had authorised Mahadu to extinguish their rights or that they had consented to his doing so. Ex. 60 who proved the documents nowhere said anything about the other brothers authorizing Mahadu to do so or consenting to his doing so."

In *Pandu Lakshman Masurekar v. Anpurna* (1) it was held that

(1) [1897] 21 Bom. 798.

"in the absence of any act showing that the mortgagee is asserting himself against the owner of the equity of redemption, his possession is not adverse against the latter as regards limitation. The mere assertion of his claim by the mortgagee would not affect the right of the real owner of the equity of redemption where a person having no right in the property pretends to sell the equity of redemption to the mortgagee."

Here no doubt, Mahadu was a co-mortgagee with his brothers, but he had no right to sell their interest in the equity of redemption, so far as they were concerned he was in the same position as an outsider. The general rule is that, a mortgagee cannot set up title by adverse possession against the owner so as to defeat his right to redeem. That was decided in *Bhagvant Govind v. Kondi* (2). We have been referred to the case of *Puttappa v. Timmaji* (3), where there was a sale of the equity of redemption to an outsider, but though the purchaser from a mortgagee can set up a title by adverse possession to the original mortgagors, that does not affect the principle that the mortgagee himself cannot set up a title against the mortgagor. Since then the mortgagee in 1879 did not take the most ordinary precaution to see that the right to redeem which lay in the parties to the mortgage-deed was extinguished, it follows that he is now in a difficult position when the descendants of those parties assert their right to redeem. The mortgagee cannot prove that their ancestors consented to the right of redemption being extinguished. There is no hardship really in the case, because there has been an inquiry of what is due to the mortgagees for principal and interest and also an account of the improvements made to the property.

The decree, therefore of the learned appellant Judge must be confirmed.

The plaintiffs cross-objected on the ground that they ought to have been entitled to redeem the whole. But when Mahadu purported to convey to the mortgagee the right to redeem, as there is no doubt about his having a share in the equity of redemption, that brought about a merger of the mortgage to that extent, and consequently the present plaintiffs can only be allowed to redeem the three-fourths of the land in dispute.

Therefore the cross-objections are dismissed with costs and the appeal is dismissed with costs.

(2) [1890] 14 Bom. 279.

(3) [1890] 14 Bom. 176.

Fawcett, J.—I agree. The appellants clearly cannot rely on adverse possession against the right to redeem asserted in this suit, not only because of the rule which bars a mortgagee setting up adverse possession against his mortgagor, but also because, in any case, the period of adverse possession that would suffice to bar the right of suit to redeem under Art. 148, Lim. Act, viz., 60 years, has not expired. Therefore under S. 28, Lim. Act, the equity of redemption, which is now asserted, would not have been extinguished. It seems to me that the dispute really rests upon the decision on Issue 3 in the lower Court, viz., had the mortgagors other than Mahadu consented to and authorized the latter's rajinama? This issue has been found by the lower appellate Court in the negative. And, although there are considerations which may be said to favour the view taken by the trial Court that there was such consent and authorisation, yet there are other considerations which go the other way. Certainly, to my mind, there is no clear proof of such consent and, in any case it is purely a question of fact which in second appeal we cannot decide for ourselves. Any presumption that there may be in the appellant's favour under S. 135-J of the Bombay Land Revenue Code is, in the circumstances, rebutted. Accordingly, I can see no sufficient reason for interfering with the lower Court's decree.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 192

HEATON AND MARTEN, JJ.

Wolf & Sons—Plaintiffs—Appellants.

v.

Dadiba Khimji & Co.—Defendants—Respondents.

Original Civil Appeal No. 14 of 1918, Decided on 31st July 1919, from judgment of Macleod, J., D/- 12th December 1918, in Original Civil Suit No. 827 of 1917.

Contract Act (9 of 1872), Ss. 21, 65 and 72—Contracts with enemy firm—Subsequently liquidator under Enemy Trading Act entering into contracts for realising pledged goods held "contracts" within meaning of Contract Act and could not be avoided under S. 21—Payments made under such contracts held could not be recovered under S. 72—Enemy Trading Act (10 of 1916), S. 13.

Plaintiff, a German firm trading in Bombay, engaged the defendants as guarantee brokers

and Muccadums, the latter depositing, by way of guarantee, Rs. 50,000, with the branch of the firm at Bombay. Between 15th and 23rd July 1914, the firm contracted to purchase from defendants certain bales of cotton for forward delivery. The political atmosphere in Europe at that time having created uneasiness in the market, the defendants on 3rd August 1914 demanded repayment of their security deposit, and on the same day the sum of Rs. 40,000 was paid to them, and as regards the balance, they were informed that it was impossible to draw money from Europe. War broke out at 11 p. m. on 4th August between Great Britain and Germany. On 5th August the plaintiffs, through their manager at Bombay, entered into an agreement with the defendants recording the pledge of 797 bales of cotton blankets as security for the balance of the deposit and the differences on the forward cotton contracts. On 27th August certain cotton bales were pledged to defendants as further security, and on 3rd September the forward cotton contracts were closed by cross-contracts. The manager of the firm was interned on 5th September and the affairs of the firm at Bombay placed in charge of a Liquidator, who, in 1915, entered into an agreement with the defendants for the sale of the cotton blankets and of the cotton, the terms of which were that defendants were to sell the blankets and repay themselves out of the sale proceeds, and that the Liquidator was to sell the cotton and give the defendants a first charge on the sale proceeds for any balance remaining due to them after taking credit for the sale proceeds of the blankets. Both sales were effected, but as the sale proceeds of the blankets were insufficient to satisfy the amount due to the defendants, they in February-March 1916 made a demand on the Liquidator for payment of the balance out of the sale proceeds of the cotton. In April 1916, the Liquidator repudiated this agreement, demanded the sale proceeds of the blankets, less Rs. 10,000 and certain other charges, and declined to pay anything out of the sale proceeds of the cotton. After some further correspondence between the parties the Liquidator, on 6th August 1917, brought the present suit to recover from the defendants the sale proceeds of the blankets, less Rs. 10,000, shop rent and wages, on the grounds.

(1) that the pledge, being a transaction for the benefit of an enemy, was void; and

(2) that the contracts for the purchase of cotton became void on the outbreak of war, and the subsequent pledge and setting off of forward contracts were of no legal effect.

The defendants counter claimed to recover from the sale proceeds of the cotton the amount of the balance due to them. The trial Court dismissed the plaintiffs' suit and decreed the counter claim. On appeal by the plaintiffs:

Held: that the plaintiffs' suit had been rightly dismissed and the defendants' counter claim rightly decreed; that the agreements entered into by the Liquidator with the defendants were "contracts" within the meaning of the Contract Act and could not be avoided under S. 21 of that Act as being made under any mistake of law, and payments made to the defendants were payments under these binding contracts and could not be recovered under S. 72 of the Act.

[P 200 C 2]

Compbell and Coltman — for Appellants.

Kanga and Desai — for Respondents.

Marten, J.—This is an appeal from the judgment of Macleod, J. of 12th December 1918 dismissing the plaintiffs' claim in this suit and allowing the defendants' counter-claim. On the figures since agreed, the amount of the claim is Rs. 69,467-9-0, representing the nett proceeds of sale of certain cotton blankets. The amount of the counter-claim is Rs. 58,440-9-0, representing part of the nett proceeds of sale of certain cotton bales. The aggregate amount in dispute is therefore Rs. 1,27,908. This sum represents the amount alleged to have been owing to the defendants on the security of the blankets and bales, which were pledged to them for differences on certain cotton contracts. The plaintiffs say these pledges and contracts became or were illegal and void, having regard to the outbreak of war at 11 p. m. on 4th August 1914, and that they are entitled to recover the sale proceeds of the blankets which were sold by the defendants in and prior to 1915, and to retain the sale proceeds of the bales which were by arrangement sold by the then Liquidator of the plaintiffs in the same year. Counsel for the appellants stated that apart from the sums in dispute, the realised Indian assets of the plaintiffs are insufficient to meet their Indian liabilities, but there is no evidence before us to that effect.

It is common ground that both the blankets and the cotton bales were, prior to the war, the property of the plaintiffs, Wolf & Sons, a German firm with its head office in Germany and a branch office at Bombay, which was managed by a German named F. Zoller, who was interned on 5th September 1914. Para. 2 of the plaint describes the plaintiff firm as being "incorporated;" but there is no evidence of this, and they have been treated in these proceedings as an ordinary partnership firm. From the report in *Wolf & Sons v. Carr, Parker & Co* (1) this appears to be their correct status. The plaintiff firm now sues by Mr. P. S. Mellor, the present Controller of Hostile Trading Concerns, Bombay, who was appointed Liquidator of this Hostile firm by the Bombay Government order of 20th September 1916, Ex. A to the plaint. The

(1) [1915] W. N. (Eng.) 195=91 T. L. R. 407

defendants Dadiba Khimji & Co. are an Indian firm carrying on business in Bombay, and were the guaranteed brokers and Muccadums of the plaintiffs prior to the war.

It is also common ground that between 4th August and 3rd September 1914 (inclusive) the blankets and bales were handed over to the defendants by Zoller on behalf of the plaintiffs as security for (a) the cotton differences, and (b) Rupees 10,000, the balance of a deposit of Rupees 50,000 by the defendants. No dispute arises about the Rs. 10,000. That is admitted to have been since repaid, and properly repaid, to the defendants out of the proceeds of sale of the blankets. But a dispute does arise about the cotton differences. These arose out of certain pre war cotton contracts between the plaintiffs and the defendants for January to March 1915 delivery, which were closed or purported to be closed by Zoller on behalf of the plaintiffs on 3rd September 1914, and showed a heavy balance payable to the defendants on the due dates. To secure the sum ultimately payable by the plaintiffs on these pre war contracts, Zoller, pledged the cotton blankets on 4th or 5th August 1914, and by way of further security the cotton bales on or about 26th or 27th August. There is no evidence of any further express pledge on 3rd September.

What happened to the business after Zoller was interned was this. One Tombroff was appointed Liquidator by Government, and, in the course of his duties, he appears to have taken directions from time to time from Mr. G. S. Hardy, I. C. S., the then Controller of Hostile Trading Concerns. At the trial, the order appointing Tombroff was called for by the defendants. It was not produced, but counsel for the plaintiffs stated: "We don't dispute that he" (Tombroff) "had power to deal with the assets of Wolf & Co." The trial accordingly proceeded on that footing.

In the course of managing or winding up the business in 1915, Tombroff had to deal with the cotton blankets and bales and also with the pledges which the defendants claimed thereon for the amount of the cotton differences. Having regard to the approaching monsoon, Tombroff thought it desirable, if not imperative, to sell these goods, and he accordingly approached the Controller and

the defendants on the subject. As regards the blankets we have a correspondence which is very material. Writing to the Controller on 5th June 1915, the Liquidator says:

"I have the honour to inform you that there are now the following stocks left with me which I would propose selling by auction in small lots 799 bales of cotton blankets in the godown of Dadiba Khimji & Co. The blankets are in possession of Dadiba Khimji & Co. as security against differences due to them on cotton, but I trust there would be no objection on their part to have these goods sold. Their claims have been duly taken note of as for the blankets it is imperative they should be sold now.

To this proposal for sale the Controller agreed in a letter of 11th June 1915.

Then the Liquidator after taking the advice of his Solicitors wrote to the Controller on 1st July as follows:

"Rs. 797 bales of cotton blankets.

"I have the honour to acknowledge receipt of your letter of 11th instant referring among other lots to the 797 bales mentioned above."

"These bales were given in charge of Dadiba Khimji & Co., Muccadums of this firm, under an agreement dated 5th August 1914; and with the view of obtaining possession of the same I consulted Messrs. Payne & Co., for opinion, and received their reply as per their letter enclosed. Under the circumstances I shall arrange with Dadiba Khimji & Co., for selling these goods by public auction and the proceeds realized to be retained by Dadiba Khimji & Co. against their claim on this firm."

It will be noted that this letter to the Controller tells him that the agreement relied on by the defendants is dated 5th August 1914 which is after the outbreak of war.

The enclosed opinion of the Solicitors Messrs. Payne & Co., which is dated 16th June 1915, was as follows:

"Dadiba Khimji & Co. and Wolf & Sons.

Referring to your letter of date Dadiba Khimji & Co. have got the blankets in question as security for payment of the moneys due to them, and you are therefore not entitled to claim delivery of the blankets without paying the moneys due to them. You may, therefore allow Dadiba Khimji & Co. to sell the blankets after consultation with you as to the price for which they are to be sold. We return the papers sent to us here with."

The letter of instructions to the solicitors which they refer to is not in evidence: nor are we told what were the papers they returned.

On 2nd July the Controller acknowledged the receipt of the liquidator's letter of 1st July and its enclosure. Thereupon the Liquidator appears to have carried out the arrangement contemplated, that is to say, he agreed with the

defendants that they should sell the blankets and apply the sale proceeds in or towards payment of their debt for the cotton differences.

The defendants accordingly proceeded to sell the blankets by auction, but as appears from their letter of 7th October 1915 to the liquidator, only 180 bales were sold. This letter is material and I may quote portions of it.

"Re Blankets accounts. W. Wolf & Sons.

We have to bring to your notice the following and shall thank you to let us know your decision after due consideration.

Out of 737 bales of blankets which are mortgaged to us by W. Wolf & Sons we have sold so far with your consent by auction the following quantities at the rates mentioned below:

180 bales fetched Rs. 17,695.

Out of the amount we have paid Rs. 412 8-0 as to Messrs. Menessee & Co. auctioneers their commission at 2 1/2 per cent.

We have to say that the way these blankets are sold by auction, they are not fetching their real value because people will not pay their prices in auction and as this is prejudicial both to W. Wolf & Sons' interest and to ours, we would propose to allot the balance of about 500 bales to us against our outstanding claim with W. Wolf & Sons, and we are prepared to pay Rs. 10 per bale more than the average price obtained in the three auction sales.

The assuring is of course, not possible for you to do because you have to sell quickly and close the liquidation. Please remember that the running expenses per month are about Rs. 750; we have to pay Rs. 450 in shape of godown rent and there is insurance and shop rent and wages, etc., which expenses will be saved to you, besides the auctioneers' commission at 2 1/2 per cent if the goods are sold by auction."

The liquidator consulted the Controller on this proposal and wrote to him on 22nd October 1915 as follows:

"With reference to the interview I had with you this afternoon in connexion with the sale of blankets of this firm mortgaged to Dadiba Khimji & Co., I have the honour to inform you that I have duly intimated to them that their offer is accepted at the prices realized in the auction sale held on the 18th instant. There are some bales absolutely damaged which I believe can be only sold by auction, and in the interest of the firm I would suggest this procedure."

It appears from a note on this letter that a verbal reply was given by the Controller on 23rd October 1915.

Then on 28th October Tombroff wrote to the defendants as follows:

"With reference to my letter dated 8th instant I have referred to the Controller .. your offer for purchase of sound bales out of the lot of the blankets mortgaged to you by this firm.

"Please note that the Controller has accepted your offer to buy at the prices realized in the auction sale of Messrs. Crawford & Co. held on 18th instant. As there is very short time for the termination of the liquidation, I should ask you to submit to this office a complete state-

ment of account of all bales so far sold including those purchased by you with amounts realized and your bills for godown rent and insurance charges, etc. . . ."

The defendants acknowledged this letter on 29th October and agreed to pay a certain sum for some scales and tarpaulins mentioned in the Liquidator's letter of 28th October.

On 12th February 1916 the defendants sent to the then liquidators, Ferguson & Co., their statement of account for the blankets, scales and tarpaulins, and on 10th March 1916 their final account showing a balance of Rs. 47,191 still due to them and which according to them had been agreed by Tombroff to be paid out of the sale proceeds of the cotton bales in his hands.

Now as regards the cotton bales we have no correspondence as to the arrangement arrived at. There was however no cross examination of the defendant's witnesses on the point: nor have the plaintiffs put in any defence to the defendant's counter claim or denied in any pleading the agreement set up in para. 13 of the written statement, or called Tombroff or Mr. Hardy as witnesses. I am accordingly satisfied that the agreement was made between Tombroff and the defendants, and that in effect it was as follows;

Tombroff was to sell the cotton and the defendants were to give delivery to Tombroff's purchasers and allow Tombroff to receive the purchase money, but on this express condition that the balance of the defendants' claim remaining after the realisation of the blankets was to be paid out of the proceeds of sale of the cotton. I think one may also infer that Tombroff acted here with the approval of the Controller, as he undoubtedly did as regards the blankets.

The precise date of this agreement about the sale of the cotton bales does not appear, but I think it clear that the sales took place somewhere in 1915. The reason no doubt why the evidence is rather meagre is that at the trial there was really no dispute as to the facts. The only witness called by the plaintiffs was Zoller, and he could not depose to the arrangement with the Liquidator, for he was interned at the time, and it does not appear that he was consulted in any way. Counsel tells us, too that he could not be questioned much, owing

to his strange manner in the witness-box and that he committed suicide the same evening.

It is common ground however that the arrangement in question was carried out so far as the defendants were concerned. They gave delivery to Tombroff's purchasers and allowed him to get possession of the sale-proceeds. The plaintiffs however now repudiate the condition on which these bales were given up by the defendants, and the sale proceeds obtained by Tombroff and claim that they are under no obligation to pay what was agreed to be paid to the defendants.

As I have already said, the defendants' final accounts were sent to the then Liquidators on 12th February and 10th March 1916, and it was not till 12th April 1916 that the defendants had any intimation that the plaintiffs repudiated the transaction. This letter of 12th April 1916, which was written to the defendants by the attorneys of the then Liquidators, alleged that the original pledge of the blankets on 5th August 1914 was illegal and void: that the Liquidators were entitled to the sale proceeds in the hands of the defendants as pledgees: that the Liquidators would however give credit for the Rs. 10,000 deposit but demanded payment of the balance of the sale proceeds of the blankets within 24 hours, in default of which they would without further intimation or delay file a suit to recover the sale proceeds. The demand for payment within 24 hours was utterly unreasonable, if not silly, but it is almost a common form among Bombay Solicitors and will probably take time to eradicate. It is quite in keeping with this sort of demand that no proceedings to enforce it were taken for over one year and one quarter, viz., till the present suit was instituted on 6th August 1917, and that after a further 13 months the plaint was amended materially.

To complete the main facts, I should state that on 13th November 1915 Tombroff wrote to the Controller drawing his attention to a decree of Macleod, J., of the previous day in *Textile Manufacturing Co. Ltd. v. Salomon Brothers* (2) (since reported). whereby according to Tombroff

"all contracts entered into with alien firms are held as cancelled by virtue of the Royal Proclamation."

The writer proceeded,

"I have also to point out that this firm held a stock of blankets which the manager had handed over to Dadiba Khimji & Co. as security against their claim for differences on cotton contracts, and after consulting my solicitors I shall have to claim (since the question of contracts is settled as above) to obtain possession of whatever stock there may be still unsold in the hands of Dadiba Khimji & Co. to be included in the liquidation."

It does not, however appear that the Controller took any steps on this letter or made any communication to the defendants. The first hostile communication to them was the solicitors' letter of 12th April 1916. The appellants rely on this letter of 13th November 1915 as establishing the date when they first discovered the pre-war contracts to be illegal and void.

The arguments presented to us on this appeal were centred round two main points, viz., (1) the effect of the war on the transactions in question and on the legal position of the Bombay branch of the enemy firm, and (2) the provisions of the Contract Act with reference to the recovery of money.

On the first branch of the case, it was urged by the appellants that the pre-war contracts of 16th to 23rd July 1914 and the pre-war pledge if any of 4 August 1914 became ipso facto void on the outbreak of war, that the further pledges given on 5th August and on 26th or 27th August were similarly void, and that the cross contracts of 3rd September were so tainted with the illegality of the pre-war contracts as to be themselves void, or alternatively only amounted to the settlement of a nullity. It was further urged by the appellants that Zoller's agency terminated ipso facto on the outbreak of war, and that therefore he had no power to enter into any of the subsequent transactions.

In the view I take of this case, it is not necessary for me to decide whether these propositions are well founded. I think that for the purposes of this case one may assume in favour of the appellants, but without deciding the point that all their contentions on this head are correct. But while making this assumption, I am of opinion that at any rate up to November 1915, the legal position of an Indian branch of any enemy

(2) [1916] 40 Bom. 570=33 I. C. 353.

firm was sufficiently doubtful as to afford some justification for the view that the transactions in question were valid. For that purpose and that purpose only I will refer to certain proclamations and Orders then in force in India.

The Royal Proclamation No. 1 of 5th August 1914 (see English Manual of Emergency Legislation, 1914, p. 37) has a somewhat obscure clause at the end which probably standing by itself would not validate trade with a branch like that we have to deal with. But the official announcement of 22nd August 1914 issued by the treasury in explanation of the Proclamation No. 1 (see English Manual, p. 377) stated in Para. 3:

"If a firm with headquarters in hostile territory has a branch in neutral or British territory trade with the branch is (apart from prohibitions in special cases) permissible, as long as the trade is bona fide with the branch, and no transaction with the head office is involved."

And Para. 4 stated:

"Commercial contracts entered into before war broke out with firms established in hostile territory cannot be performed during the war, and payments under them ought not to be made to such firms during the war. Where however nothing remains to be done save to pay for goods already rendered delivered, or for services already rendered there is no objection to making the payment."

This was followed by the Royal Proclamation No. 2 of 9th September 1914 (see Indian Manual of Legislation and Orders relating to the War, Edn. 6, 1918 p. 77). This declared that as from the date thereof, Proclamation No. 1 together with any public announcement officially issued in explanation thereof was revoked and the present Proclamation substituted therefor. This obviously referred to the announcement of 22nd August, and to that extent recognized its former validity. Then in para. 3 it defined "enemy." This definition would clearly include the plaintiffs' head office in Germany, but perhaps not Zoller himself, as he was neither "resident nor carrying on business in Germany." Para. 6 dealt with branches as follows:

"Provided always that where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

Then in para. 7:

"Nothing in this proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business or being in our Dominions, if such payments

arise out of transactions entered into before the outbreak of war or otherwise permitted."

In addition to these proclamations, there was in India on 8th August 1914 a Notification: see Indian Manual p. 184, putting in force the Foreigners Act 3 of 1864. By virtue of S. 9 of that Act, no foreigner was to travel in or pass through any part of British India without a license. This was followed on 20th August by a Foreigners Ordinance No. 3 of 1914: see Indian Manual, p. 47 giving powers to the Governor-General in Council by order to restrict the egress of foreigners and to prohibit or restrict their trade or business. Then on 22nd August there was a Notification: see Indian Manual, p. 368 prohibiting foreigners from leaving the country. On 28th August two Press Notes were issued in Bombay by the Political Department, the one on the lines of the Treasury Explanation of 22nd August, and the other stating certain arrangements permitting the clearance and disposal by German subjects of imported and other goods, and permitting the delivery to British subjects of goods, from German firms, and to "have commercial dealings with them in respect of existing stocks only." These Press Notes are referred to in *Textile Manufacturing Co. Ltd., v. Salomon Brothers* (2) and are set out in full in Campbell's "Trading with the Enemy" at pp. 408-409. On 14th November 1914 the Hostile Foreigners (Trading Order (see Indian Manual, p. 373), was passed, rendering it necessary for all hostile firms to obtain within one month licenses to trade. This provided in para. 5 (2) that:

"An application on behalf of a hostile foreigner or hostile firm not resident or located in British India shall be signed by a manager or other agent resident in British India."

As regards the plaintiffs themselves it appears that by a Notification of 4th March 1915 (see Indian Manual, p. 379,) their licenses to trade were to "remain in force" until 14th August 1915; and it appears that by a subsequent Notification this period was extended to 14th November 1915: see Note (2) on p. 380 of the Indian Manual. As the Notification of 4th March says that the licenses are "to remain in force," I should infer that Wolf & Sons had previously obtained the necessary license to trade.

Now if one looks at the proclamations and in particular at paras. 6 and 7 of the

Proclamation No. 2, I think a business man—or for the matter of that a lawyer—might not unnaturally infer that you could deal with what I will call an enemy branch in India, provided such dealing involved no intercourse with the head office in Germany: see *Ingle Limited v. Mannheim Continental Insurance Company* (3). And further that where, as here, the transaction merely involved payment by the enemy branch, namely, in respect of the cotton differences, one might fairly urge that it was an authorized payment within para. 7, as being a payment to a British subject arising out of a transaction entered into before the outbreak of war: see same case p. 232 [of (1915) 1 K. B.] and *Halsey v. Lowenfeld* (4). And that if such a payment was authorized, it was also legitimate to do something short of payment, viz., to give security to a British subject for such payment.

Or, again, if one looked at Hall's International Law, Edn. 6, p. 388 which was cited with approval by Sargant, J., in *Thurn and Taxis v. Moffitt* (5), it might be said that at any rate until his internment Zoller was not disabled by the war from entering into the transaction in question. The passage I refer to is as follows:

"When persons are allowed to remain, either for a specified time after the commencement of war, or during good behaviour, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country."

Now, here, Zoller was prohibited by the Notification of the 8th, or, at any rate of 22nd August from leaving the country—a fact which was relied on by Sargant, J. The actual decision in that case, viz., that the princess, though of enemy nationality, was entitled to sue in the English Courts for an injunction to restrain the publication of libels on her was approved by the Court of Appeal in *Porter v. Freudenberg* (6) and in *Schaf-*

fenius v. Goldberg (7), the latter of which cases decides that the right to sue is not lost by internment.

Further, if it be urged that the transactions in question must be judged in the light of the Proclamations actually in force at the date of the transaction and that the official explanation of 22nd August and the two Press Notes of 28th August had no legal authority, it may be urged in answer that this is taking a somewhat narrow view of the subject, and that it would not be unreasonable for the Controller or the Liquidator acting under his directions to abide by the spirit of the later Proclamation, viz., No. 2 of 9th September 1914, and which remained in force during 1915.

As was said by Macleod, J., in *Textile Manufacturing Co. Ltd. v. Salomon Bros.* (2), speaking of affairs in Bombay during the latter half of 1914:

"It is not to be wondered at that confronted with this bewildering array of Proclamations, Ordinances, Orders and official communications, abounding in conflicting provisions, the members of the mercantile community in Bombay, whether British subjects, foreigners or enemies, remained paralyzed—unable to form any opinion as to what they could do or what they could not do."

In the present case however we have to deal with the Controller, a Government Official who presumably had special facilities for ascertaining the policy and intentions of Government, and if necessary of obtaining the highest legal advice.

Further, in the present case, Macleod, J., while holding that the pre-war contracts became invalid and that the pledges were invalid, thought that the September settlement by cross-contracts was in itself valid, as was also the contract of 26th August (apart from the actual pledge) and that Zoller's agency was not terminated by the war. The learned Judge left open the question whether the defendants could in any event claim to rank as unsecured creditors.

I think I have now stated enough to show that in 1914-15, the true legal position was open to doubt, at any rate in some particulars. As I have already said, I need not and I do not decide what that position was. I merely assume for the purposes of this case that the appellants are correct on this first branch of the case.

(7) [1916] 1 K. B. 284=35 L. J. K. B. 374=113 L. T. 949=60 S. J. 105=32 T. L. R. 133.

(3) [1915] 1 K. B. 227=34 L.J.K.B. 491=112 L. T. 510=59 S. J. 59=31 T. L. R. 41.

(4) [1916] 2 K. B. 707=35 L.J.K.B. 1493=115 L. T. 617=32 T. L. R. 709.

(5) [1915] 1 Ch. 53=84 L.J. Ch. 220=112 L.T. 114=59 S. J. 26=31 T. L. R. 21.

(6) [1915] 1 K. B. 857=112 L. T. 313=84 L. J. K. B. 1001.

I come accordingly to the second branch which appears to me to be the crux of the case, viz., on what legal grounds can the plaintiffs claim to recover the sale proceeds of the blankets. One may clear the ground by saying that their claim is based solely on S. 72, or alternatively, on S. 65 of the Indian Contract Act. They admitted that no claim based on the English Law apart from that Act could succeed. The relief given in *Gulalchand v. Fulbai* (8) (where the illegal purpose had not been carried out) was therefore inapplicable. In view of such cases as *Kearley v. Thomson* (9) this admission was I think properly made, having regard to the appellants' contentions that all the transactions were illegal. Nor need I consider whether if this Court was administering some fund, the mistake could be rectified: see *Robinson, In re, McLaren v. Robinson* (10) and *Ainsworth, In re, Fritch v. Smith* (11), nor whether if the payment had been made to its own officer by a mistake of law the payment would be refunded: see *Simmonds, Ex parte, Carnac, In re* (12), *Opera Limited, In re* (13).

Before us, S. 72 was relied on first in argument. It was said that this was a case of "money paid by mistake," viz., a mistake of law, all parties thinking the contracts and pledges were valid and the debt due. When asked whether the appellants relied on any mistake of the then Liquidator, counsel at first said no, but at a later stage withdrew that answer and said yes. I am not surprised at counsel's first answer. There is not a word in the pleadings about the Liquidator or Controller being under any mistake; no issue was raised about it; and neither of them went into the witness-box to say he had made any mistake. The amended plaint is, I think, based on a different section altogether, viz., S. 65, as will be seen from looking at

pp. 9, 9 A and 14 and in particular to the allegation in para 9 as to the agreement being "discovered to be void."

We were referred by the appellants to p. 4 of the defendants' supplemental written statement of 12th October 1918, but this only dealt with the cross contracts of 3rd September 1914 and was in answer to the amended paras 9 A and 10 of the plaint. So, too Issues Nos. 5 and 5-A refer to a mistake at the time of the settlement mentioned in Issue No. 4 viz., the settlement by cross contracts on 3rd September 1914. It has nothing to do with any subsequent mistake by the Liquidator.

It seems to me therefore that on the pleadings, this point under S. 72 is not open to the appellants and that in any event there is not sufficient evidence of any payment "by mistake." In the view I take, therefore it is really unnecessary to consider whether S. 72 applies to a mistake of law. But as the learned trial Judge did deal with this point as it may be urged that an implied amendment of the pleadings was thereby made and the case argued on the assumption that there was some evidence of a mistake in law, I will deal with the matter on this footing.

The next difficulty in the way of applying S. 72 is S. 21, which says that "A contract is not voidable because it was caused by a mistake as to any law in force in British India." Consequently, if S. 72 applies to mistakes of law, a man might recover payments under S. 72, although he could not avoid the contract under S. 21. I am thinking of course, of a case where the same mistake is made at the inception of the contract as on the payment thereunder. Counsel for the appellants admitted that in such a case S. 72 would not apply. The payment in such a case he said, would be made under the contract (which *ex hypothesi* could not be rescinded under S. 21), and consequently the payment would not be by mistake.

The appellants contended, however that S. 21 did not apply here because there was no "contract" as defined by S. 2 (h), viz., "an agreement enforceable by law." There was at most an "agreement not enforceable by law" and therefore void under S. 2 (g). This contention is, I think erroneous on the facts. In my judgment the Liquidator entered into

(8) [1909] 33 Bom. 411=3 I. C. 748=11 Bom. L. R. 649.

(9) [1890] 24 Q. B. D. 742=59 L. J. Q. B. 288=63 L. T. 150=38 W. R. 614=54 J. P. 804.

(10) [1911] 1 Ch. 502=80 L. J. Ch. 381=104 L. T. 881=55 S. J. 271.

(11) [1915] 2 Ch. 96=84 L. J. Ch. 701=118 L. T. 868=31 T. L. R. 392.

(12) [1885] 16 Q. B. D. 303=55 L. J. Q. B. 74=54 L. T. 439=34 W. R. 421.

(13) [1871] 2 Ch. 154=60 L. J. Ch. 464=64 L. T. 813=39 W. R. 831 on appeal (1891) 3 Ch. 200=60 L. J. Ch. 839=65 L. T. 371=39 W. R. 705.

binding agreements with the defendants for the sale of the blankets and bales and for the application of the proceeds in discharge of the defendants' debt. The disabilities attaching to Zoller did not apply to the Liquidator or the Controller. He as counsel admitted at the trial, had power to deal with the assets.

Further the Enemy Trading Act No. 10 of 1916 (Indian Manual, p. 15), which was not cited to us, provides in S. 13 that

"Any act done after 3rd day of August 1914, by or under the orders of any officer of Government in respect of the property, moveable or immovable of any hostile foreigner or hostile firm which if this Act had been in force, could have been validly done in the exercise of the powers conferred thereby or which could have been conferred thereunder is hereby validated."

Sections 4 and 5 give wide powers for winding up enemy businesses and dealing with their assets in accordance with the rules to be made by the Governor-General in Council. This provides in effect that such a winding-up order is to have the same effect as if made by the Court under the Companies Act 1913, subject to modifications to be specified.

Now one of the ordinary duties of a liquidator confronted with a person claiming to be a secured creditor is to decide whether he will admit the claim or fight it, and if necessary, he will obtain the directions of the Court. And subject to the control of the Court he can pay creditors or make any compromise or arrangement with creditors or persons claiming to be creditors: see Companies Act, S. 234. But under S. 3, Enemy Trading (Winding-up) Order 1916: see Manual, p. 284 Government takes the place of the "Court" in applying the Companies Act to this winding-up; and as appears by the notification, Ex. A to plaint, the present Controller can exercise all the powers conferred on Official Liquidators by S. 179, Companies Act, without the sanction or intervention of Government, and I think that the powers under S. 234 could also have been conferred on him.

I am therefore of opinion that apart from all other grounds, the acts of Tombroff and Mr. Hardy are validated by S. 13, Enemy Trading Act 1916, as being acts which could have been validly done in exercise of powers which could have been conferred under that Act. As I have already pointed out the law at the time was not clear, and I do not think

that either of these gentlemen can be blamed for preferring a settlement to a law suit, particularly when they were told by their legal advisers that the defendants were right.

It is not suggested that the wide powers given by S. 6, Enemy Trading Act 1916, to the Governor-General in Council of cancelling contracts injurious to the public interest or re-vesting property transferred under them have ever been or could be exercised in the present case.

I am therefore of opinion that the agreements entered into by the liquidator with the defendants were "contracts" within the meaning of the Contract Act and could not be avoided under S. 21 as being made under any mistake of law. That being so, I am further of opinion that the payments made to the defendants were payments under this binding contract, and could not be recovered under S. 72.

In this view of the case, I need not decide whether S. 72 can ever apply to a mistake of law, but as at present advised, the passage referred to by the learned trial Judge in Pollock and Mulla (Edn. 3) at p. 308 seems to me good sense: and good sense is generally good law. The passage in question runs:

"The man who has chosen to judge his own cause upon all the facts and has decided against himself, cannot appeal to the Court against his own judgment, whether it was well informed or not."

I may also refer to the judgment of the Court of Appeal in *Rogers v. Ingham* (14) as showing the evils which would result from allowing parties to re-open transactions on the ground of some mistake of law having been made by them or their legal advisers.

I may also refer to the *Holsworthy Urban Council v. Holsworthy Rural Council* (15) where Warrington, J., held that a local authority was bound to continue payments under a compromise founded on an erroneous view of the law, notwithstanding that apart from such compromise the payments would be ultra vires. So, too, payments made under compulsion of legal process, whether in a home or foreign Court of law, cannot be

(14) [1876] 3 Ch. D. 351=35 L.T. 677=25 W.R. 338.

(15) [1907] 2 Ch. 62=76 L.J. Ch. 380=97 L.T. 634=71 J.P. 330=5 L.G.R. 791=23 T.L.R. 452.

recovered : see *Clydesdale Bank, Ltd. v. Schroder & Co.* (16). These four English cases illustrate the general principles adopted in England, and I only cite them by way of analogy.

I should perhaps have added that before us the appellants admitted that the arrangement with Tombroff as to the application of the sale proceeds of the blankets amounted to a payment. Under these circumstances, I think no real distinction arises between the few blankets sold before June 1915 and those sold afterwards.

I may also add that the defendants, in the alternative, contended that the liquidator's agreements were a compromise and in any event valid, and they relied on *Callisher v. Bischoffsheim* (17) and *Miles v. New Zealand Alford Estate Co.* (18). In the view I take however it is unnecessary to decide this point.

One other point may be noted, viz., that there is a clerical slip in the printed judgment on p. 91 as to the answer of the learned trial Judge to the important issue 7. This should clearly be in the negative and not in the affirmative as printed.

The alternative claim of the plaintiffs is based on S. 65 which runs :

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Now I have already held that the agreements with the liquidator was valid. Consequently, in my opinion, S. 65 does not apply to the payments in question, as they were made to the defendants under valid agreements and not under void ones.

But supposing for the sake of argument that the payments were made under the contracts and pledges ending 3rd September 1914, and that the liquidator's agreements were mere machinery for carrying out these contracts and pledges, the appellants have still other difficulties to contend with. The first arises from the words "agreement discovered to be void." I agree with the learned trial Judge that the word "agreement" as used

in that section does not apply to the pre-war contracts, for they were "contracts" within the meaning of Contract Act and not "agreements." As regards the subsequent agreements, the parties knew all the material facts and I doubt whether the words "discovered to be void" are really applicable to those agreements : see *Gulabchand v. Fulbai* (8). The decision in *Jijbhai v. Nagji* (19) can be supported as being based on the validity of a collateral agreement for a refund, quite apart from S. 75 : see p. 698.

Next, if the other branch of the section is relied on, no "advantage" under the pre-war contracts had been received by the defendants when ex hypothesi they became void on the outbreak of war. The plaintiffs' case is that there was no pledge till 5th August. It hardly therefore lies in their mouths to contend there was a pre-war pledge and therefore an antecedent advantage for which compensation must now be given. In any event the advantage which the plaintiffs are trying to recover is the payment made to the defendants in 1915, and not the pledge in 1914. The appellants argued that under S. 65 the advantage need not be received before the contract becomes void or the agreement is discovered to be void. This is not, I think, the true construction of S. 65. I think the line is drawn at the time the agreement is discovered to be void or when the contract becomes void.

In the result therefore I respectfully agree with the learned trial Judge that the payments in question cannot be recovered by the plaintiffs under either S. 72 or S. 65, Contract Act, and that accordingly their claim fails.

As regards the counter claim, the position at first sight seems somewhat different, for here it is the defendants who are claiming moneys in the hands of the liquidator, viz., the part proceeds of the cotton bales. This claim is based solely on the arrangement with Tombroff. They say that by virtue of that agreement the liquidator holds those moneys as earmarked or upon trust for them ; that he can only discharge that obligation or trust by paying them the moneys ; that they will then hold those moneys just as if the sale proceeds had been paid to them in the first instance ; and that their ultimate right to retain them will de-

(19) [1909] 3 I.O. 761.

(16) [1918] 2 K. B. 1=82 L. J. K. B. 750=106 L.T. 955=17 Com. Cas. 210=56 S. J. 519.

(17) [1870] 5 Q.B. 449=39 L.J. Q.B. 131=18 W. R. 1127.

(18) [1896] 82 Ch. D. 266=53 L.T. 219=51 L. J. Ch. 1035=34 W.R. 669.

pend on the decision of this Court on the claim. On this point also I agree with the decision of the learned trial Judge. The defendants have changed their position on the faith of a promise which, in my opinion, was validly made to them by the former liquidator, and I think that promise is binding on the present liquidator.

It was next contended by the appellants that the promise only applied to the defendants' "claim" generally and did not admit any specific sum to be due, and that accordingly the whole claim could be repudiated. This, I think, is not the true view. The defendants' account might no doubt be vouched, and details such as godown rent challenged; but no repudiation of the mortgage itself was intended by the parties. That, as the correspondence shows, was regarded as valid at any rate with respect to the blankets. Nor in the view I take is this a case where the assistance of equity is asked towards carrying out an illegal agreement as in *Mohori Bibee v. Dharmodas Ghose* (20).

In substance therefore it seems to me that the defendants' case on the cotton bales stands or falls with their case on the cotton blankets. They have succeeded on the claim. I think they also succeed on the counter claim.

The appeal therefore of the plaintiffs should, in my judgment be dismissed with costs. It will not however be necessary to proceed with the account directed by the decree, as the parties have since agreed on the figures. But this need not, I think, be mentioned in the order we make.

Heaton, J. -- I agree that the liquidator entered into valid agreements with the defendants regarding the sale of the blankets and of the cotton bales and for the disposal of the proceeds. And I think so for the reasons stated by my learned brother. That being so, the plaintiffs' claim must fail, for neither S. 72 nor S. 65, Contract Act, can possibly apply to what in this case happened, in fulfilment of those valid agreements.

I therefore agree that the appeal must be dismissed with costs.

G.P./R.K. *Appeal dismissed.*

(20) [1903] 30 Cal. 539=30 I. A. 114=8 Sar. 374=7 C. W. N. 411=5 Bom. L. R. 421 (P.C.).

A. I. R. 1920 Bombay 202

MACLEOD, C. J.

Ibrahim Goolam Hussenbakhsh—Appellant.

v.

Nihalchand Waghmul—Respondent.

Second Appeal No. 1144 of 1918, Decided on 30th September 1919, from decision of Dist. Judge, Thana, in Appeal No. 155 of 1918.

Civil P. C. (5 of 1908), O. 34, R. 14—Mortgagor continuing in possession on rent-note—Execution in rent decree—Rent claim held arising out of mortgage within R. 14 and mortgage property could not be sold—Mortgagee cannot do so even by assigning decree.

At the time of executing a usufructuary mortgage, the mortgagor executed a rent-note in favour of the mortgagee and continued in possession of the property. He failed to pay the rent due and the mortgagee obtained a decree for the amount due, which he assigned to a third person, who sought to issue execution by sale of the mortgagor's equity of redemption in the mortgaged property:

Held: that the claim on which the mortgagee got a decree was really a decree for payment of money in satisfaction of the claim arising out of the mortgage, and therefore within R. 14, O. 34, Civil P. C. and that the assignee, therefore was not competent to apply for sale of the mortgaged property.

A mortgagee who obtains a decree which he cannot execute by sale of the mortgaged property, cannot put his mortgagor in a worse position by assigning his decree to a third party. [P 203 C 2]

M. K. Thakor—for Appellant.

W. B. Pradhan—for Respondent.

Judgment.—This is an appeal from the order of the District Judge of Thana, disallowing the appellant's contention that the execution of the decree passed against him in favour of Fojmal Navlaji and others could not proceed by bringing the mortgaged property to sale. Fojmal Navlaji and others were mortgagees of the appellant under a mortgage of 10th June 1913. That was a usufructuary mortgage. On the same day the defendant mortgagor executed a rent-note in favour of the mortgagee for a period of 12 months, and as he did not pay the rent under that rent-note the mortgagees filed a suit and obtained a decree for Rs. 1,000. Then they assigned that decree to the present respondents, who sought to issue execution by sale of the mortgagor's equity of redemption in the mortgaged property.

It has been contended for the appellant that the respondents cannot be allowed to bring the mortgaged property to sale otherwise than by instituting a

suit for sale in enforcement of the mortgage under O. 34, R. 14, Civil P. C. Now in cases of usufructuary mortgages it is not unusual for the mortgagees to allow the property to remain in the possession of the mortgagor on his executing a rent-note. But as a matter of fact that is merely a method of securing the interest by special agreement, that is to say, the mortgagor collects the usufruct and pays a certain amount to the mortgagee under the rent-note instead of the mortgagee collecting the usufruct himself.

It does not seem that the question which arises in this appeal has been decided in any reported case of this Court, although in more than one case which has lately come before this Bench, it has appeared that a mortgagee has obtained a rent-note from his mortgagor and issued execution on a decree under that rent-note. At first sight it might appear that that is not a decree for the payment of money in satisfaction of a claim arising under the mortgage.

This question was considered very fully in a recent Allahabad decision in *Kadma Pasin v. Muhammad Ali* (1). The facts were very similar to the facts in this case. There the property was mortgaged by a usufructuary mortgage, and a subsequent agreement was entered into between the parties, whereby the mortgagor bound herself to pay annually fixed sum of money in lieu of the offerings, and also, in case of default, to pay interest thereon. Default having been made the mortgagee sued on the agreement and obtained a decree for money against the mortgagor. In execution of this decree he attached the mortgaged property and sought to have it sold. Upon objection by the mortgagor, judgment-debtor, it was held that the mortgagee could not bring the mortgaged property to sale in execution of the decree, as the claim under the subsequent agreement was one arising under the original contract of mortgage within the meaning of O. 34, R. 14, Civil P. C. Piggott, J., at p. 407 (of 41 *All.*) says:

"In the case now before us the money for which this decree was obtained represented the usufruct of the mortgaged property to which the mortgagee was entitled as part of his contract of mortgage. His right to receive this money rested upon his position as mortgagee. The mortgagor had become liable to pay the mortgagee this money in consequence of an

agreement entered into between the parties subsequent to the mortgage; but it seems to me, in the first place, that the money for which the decree was passed was an essential part of the mortgage money, just as much as arrears of interest, which falling due on a contract of simple mortgage, become part of the mortgage money; in the second place, it seems to me that it would be doing violence to the plain language of the rule to say that the claim in satisfaction of which this decree was passed was not a claim arising under the original contract of mortgage."

I agree with these remarks; and they apply even more strongly to the facts of this case, as the agreement whereby the mortgagor agreed to pay rent was passed at the same time as the mortgage, and was therefore part of the mortgage transaction.

It has been urged that the respondents who are assignees of the original mortgagee's decree, are in a better position than their assignors. But it seems to me perfectly clear that a mortgagee who has obtained a decree which he cannot execute by sale of the mortgaged property, cannot put his mortgagor in a worse position by assigning his decree to a third party. That question was considered in *Chhagan v. Lakshman* (2). The learned Judges there referred to a dictum by Tindal, C. J., in *Booth v. Bank of England* (3):

"Whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance."

Therefore on the facts of this case, it seems to me that this claim on which the mortgagee got a decree was really a decree for payment of money in satisfaction of the claim arising out of the mortgage, and therefore comes within O. 34, R. 14 of the Code. The appeal must be allowed with costs throughout.

G P / R. K

Appeal allowed.

(2) [1907] 31 Bom. 462=9 Bom. L. R. 728.

(3) [1840] 7 Cl. & F. 509=7 E. R. 1163=51 R. R. 36.

A. I. R. 1920 Bombay 203

MACLEOD, C. J. AND HEATON, J.
Bai Parbati—Defendant—Appellant.

v.

Mansukh Jetha — Plaintiff—Respondent.

Second Appeal No. 1055 of 1918 Decided on 10th February 1920, from decision of Asst. Judge, Ahmedabad, in Appeal No. 522 of 1917.

Civil P. C. (5 of 1908), O. 21, R. 33—Restitution of conjugal rights—Execution by detention in jail should in exercise of discre-

(1) [1919] 41 All. 899=50 I. O. 184.

tion be prohibited—Previous sentence of imprisonment is no ground to refuse to exercise that discretion.

Ordinarily, a Court passing a decree for restitution of conjugal rights against a wife ought to exercise the discretion conferred upon it by R. 33, O. 21 and direct that the decree shall not be executed by the detention of the wife in prison. It is no ground for refusing to exercise this discretion that the wife has already been in jail under the sentence of a criminal Court and that it would be no violence to her feelings to be sent to jail if she disobeys the decree for restitution of conjugal rights.

[P 204 C 1, 2]

H. V. Divatia—for Appellant.

M. H. Mehta for *M. H. Vakil*—for Respondent.

Macleod, C. J.—This is a suit brought by the plaintiff, the husband, for restitution of conjugal rights against his wife, defendant 1. The suit was dismissed by the trial Court. In appeal the plaintiff got a decree. Defendant 1 was ordered to go and live with her husband. O. 21, R. 33, gives the Court discretion to order that such a decree shall not be executed by detention in prison. The learned appellate Judge has considered that rule, but considered that as the wife had already suffered rigorous imprisonment for three years on a criminal charge, and was quite accustomed to that life, it would not be any violence to her feelings to be asked to go to jail for wilful disobedience of the Court's order.

Now, it may be admitted that the Court has power to give a husband a decree for restitution of conjugal rights, and no doubt the Court has power to order the wife if she does not obey the decree, to go to jail. But the Code especially provides that the Court may order that the decree shall not be executed by detention in prison. Generally, the tendency of modern legislation is against sending women to jail in civil matters. S. 56 of the Code provides that they shall not be arrested or detained in a civil prison in execution of a decree for payment of money, and except in very serious question of contempt of Court, I doubt whether a Court would ever order a woman to be sent to jail merely for refusing to obey a decree of an ordinary nature. It may be said that decrees for restitution of conjugal rights are of a particular nature; that the law recognizes that the husband is entitled to have his wife living with him, and that the only way to enforce obedience to such an order would be ordering the detention of

the wife in prison if she refused to comply with the decree. But the days are past when a wife was considered as a mere slave or chattel of the husband. In my opinion a decree for the restitution of conjugal rights which can be enforced by imprisonment, is a relief from the barbarous and middle ages. It is recognized, and has been recognised for many years in England, that a decree for restitution of conjugal rights is merely a preliminary step to enable a wife to get a divorce when she would not otherwise be able to do so, since the refusal of the husband to obey a decree for restitution of conjugal rights is considered as desertion, and desertion equivalent to cruelty, and therefore such desertion, coupled with adultery, will be sufficient to enable a wife to get a decree for divorce. That is the only use to which proceedings for restitution of conjugal rights are now put in England. In this country they may be used by the husband as a means for preventing the wife from claiming maintenance, since, if the Court passes an order against a wife to go and live with her husband, and she refuses to do so, then she is debarred herself from making any claim to maintenance. For a wife is only entitled to separate maintenance if she has some good reason for living apart from her husband.

In my opinion, it is a sufficient consequence for the refusal to obey a decree for restitution if she has to maintain herself, and cannot make any claim against her husband for maintenance. In any event, in this case the reasons given by the learned Judge for refusing to exercise his discretion in favour of the defendant cannot be supported. I should therefore, amend the decree of the lower appellate Court by directing, under O. 21 R. 33, that the decree shall not be executed by detention in prison. The appellant will have the costs of the appeal.

Heaton, J.—A decree in this case for restitution of conjugal rights is no doubt justified by the circumstances which have come to light in the course of the case. But when the appellate Judge came to consider whether he should or should not make a direction such as is contemplated by O. 21, R. 33, Civil P. C., that is, a direction that the decree shall not be executed by detention in prison, he decided that he would not make any such direction. For that decision he gave

what is to me an astonishing reason; he thought that because the wife had already suffered rigorous imprisonment for three years, and was quite accustomed to that life, it would not do any violence to her feelings to require her to go to jail for wilful disobedience of the Court's orders. It would be interesting to ascertain in how many cases of persons who had once been sent to jail, it would not do violence to their feelings to be required to go to jail a second time. I imagine the number would be singularly few.

Then the Judge gave another reason. He said the decree would be a nullity, and that if he were to give such a direction the object of taking and giving it would be frustrated. That is not so either. The decree for restitution of conjugal rights, accompanied by a direction that the decree shall not be executed by imprisonment, is not a nullity. It is a declaration that the marital obligation of living with her husband rests on the wife, and it protects the husband against any proceedings for maintenance which the wife may institute under S. 488, Criminal P. C. Such a decree therefore does serve a really useful purpose. In this case I feel not the slightest hesitation in saying that the direction that the decree shall not be executed by imprisonment ought to be added, for, though it is perfectly true that the wife certainly ought not to be able to secure separate maintenance, it is equally true that it would be ludicrous to send her to jail for refusing to live with her husband whom she at one time apparently had attempted to murder. I therefore agree with the order proposed.

G.P./R.K.

Decree amended.

* **A. I. R. 1920 Bombay 205**

SHAH AND HAYWARD, JJ.

Dharma Lakshman Gharat — Defendant—Appellant.

v.

Sakharam Ramjirao Deshmukh—Plaintiff—Respondent.

Second Appeal No. 1203 of 1916, Decided on 22nd August 1919, from decision of Asst. Judge, Thana, in Appeal No. 60 of 1915.

* **Hindu Law—Succession—Illegitimate son cannot succeed to legitimate son's separate property.**

An illegitimate son of a Sudra cannot inherit

the separate property of his father's legitimate son as a brother. [P 206 C 1, 2]

S. S. Patkar—for Appellant.

P. B. Shingne—for Respondent.

Shah, J.—The question of law raised in this second appeal on the facts found by the lower Courts is whether an illegitimate son of a Sudra can inherit the separate property of his father's legitimate son as a brother.

The facts are that one Ganpatrao had a son Daulatrao by his first wife, two sons Raojirao and Balvantrao by his second wife, and an illegitimate son Dhakojirao by a kept mistress. Daulatrao was a separated member of the family and had acquired the property in suit; he died without an issue. The plaintiff claims his property under a sale deed passed in his favour by the sons of Raojirao, Balvantrao having died without any male issue. The defendant claims it under a sale deed by Dhakojirao. The contest between the two purchasers depends upon the rights of their respective vendors to inherit Daulatrao's property according to the Hindu law. The parties, whose right of inheritance we are concerned with, are Sudras. Both the lower Courts have decided against the defendant, who now appeals to this Court and raises the question stated above.

The point was not argued in the lower Courts, and the reported decisions are clearly against the contention: see *Ravji Mahadu Patil v. Sakuji Kaloji* (1), *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam* (2) and *Ramalinga Muppan v. Pavadai Goundan* (3). It is argued, however that the ratio decidendi in *Subramania Iyer v. Rathnavelu Chetty* (4) is not consistent with the view that an illegitimate son is excluded from all collateral succession and that the decision in *Sadu v. Baiza and Genu* (5), approved by their Lordships of the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Singh* (6), has not been considered in the case of *Ravji Mahadu Patil v. Sakuji Kaloji* (1). It is urged that it is not possible to reconcile the view that a father is an heir to his illegitimate son and the express pro-

(1) [1910] 31 Bom. 321=5 I. C. 964.

(2) [1899] 21 All. 99=(1898) A. W. N. 170.

(3) [1903] 25 Mad. 519=11 M. L. J. 399.

(4) [1918] 41 Mad. 44=42 I. C. 556.

(5) [1879-80] 4 Bom. 37 (F.B.).

(6) [1891] 18 Cal. 151=17 I. A. 128=5 Sar. 596 (P.O.).

vision that an illegitimate son in the case of Sudras is entitled to share the property of his father with the other legitimate sons with the conclusion that the illegitimate son is excluded from all collateral succession in the family of his putative father. I have carefully considered these decisions and the provisions in the Mitakshara and the Mayukha bearing on this point. Personally I do not think that the two conclusions are irreconcilable. The question of collateral succession has been fully dealt with by Banerji, J., in *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam* (2) and I do not think that any further discussion of the texts can serve any useful purposes. Bhashyam Ayyangar, J., in *Ramalinga Muppan v. Pavadai Goundan* (3) thought that it was tolerably well established that an illegitimate son, though he might succeed as heir to his paternal and maternal estate, had no claim to inherit to collaterals. Though the case of *Sadu v. Baiza and Genu* (5) has not been referred to in the case of *Ravji Mahadu Patil v. Shakuji Kaloji* (1), it is clear on the facts of that case that the point as to collateral succession did not arise for decision. Nanabhai Haridas, J., observes at p. 46 of the report as follows:

"Whether he can as a brother inherit anything from them or not, is a question upon which we are not called upon to pronounce any opinion in this case, for the plaintiff here does not claim any self-acquired property of Mahadu, nor are we called upon to express any opinion upon the other question, whether he can inherit anything from collaterals."

The judgments in *Subramania Iyer v. Rathnavelu Chetty* (4), particularly the judgments of Sadasiva Aiyar, J., and Kumaraswami Sastriar, J., show that the point for decision in that case was quite different, and that the decision as to the right of the putative father to succeed to his illegitimate son did not necessarily conflict with the view accepted by that Court in other cases as to the exclusion of an illegitimate son from collateral succession.

The current of decisions is strong and uniform and it would require very clear texts to induce any Court to reconsider the point. There is no such express text in favour of allowing an illegitimate son a right to collateral succession. On the contrary, I think that the decisions are fully justified by the Mitakshara and the Mayukha. The well-known verses which

lay down the order of succession in the case of obstructed heritage are applicable to all classes (see Mitakshara, Ch. 2, S. 1, pl. 1 and 2; Stokes' Hindu Law Books, p. 477), while the rule allowing the illegitimate sons to share the father's property with his legitimate sons is a special rule applicable to Sudras only. It seems to me very difficult to interpret the word "bhratri" (brothers) used in the text relating to succession as including illegitimate sons of the father in the case of Sudras and excluding them in the case of other classes. Neither Vijnaneswara nor Nilkantha in expounding the text has suggested such an interpretation; and according to all recognized rules of construction such an interpretation does not appear to me to be correct. The fact that the same word is used in the immediately preceding text specially relating to Sudras and in the commentary thereon with reference to illegitimate sons in relation to the legitimate sons of the same father does not appear to me to afford a sufficient basis for interpreting the same word in two different senses when applied to different classes in one and the same text expressly relating to all classes.

Besides, a dasiputra does not get the full share which an aurasa son can get; and this differential treatment accorded to him by a special text cannot be applied to the case of collateral succession. At least there is no express text for it; and it would be extending the application of a special rule for Sudras beyond the limits mentioned in the text, if illegitimate sons were treated on the same footing as legitimate half-brothers as to the order of succession and the extent of the shares.

I think that the view accepted in these decisions as to illegitimate sons not being entitled to collateral succession among Sudras is correct.

I would therefore dismiss the appeal and confirm the decree of the lower appellate Court with costs.

Hayward, J.—I concur.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 207

MACLEOD, C. J. AND HEATON, J.

Shidramappa Mariappa Manvi —
Plaintiff—Appellant.

v.

Mahomed Yusuf Imamdinsab and
others—Defendants—Respondents.Second Appeal No. 921 of 1918, De-
cided on 13th February 1920, from deci-
sion of Asst. Judge, Dharwar, in Appeal
No. 175 of 1916.**Easements—Damages — Cause of action —**
Owners of land have right to protect them-
selves from excess flow of water not brought
by them—When excess flow of water is turned
into common ditch both are bound to protect
banks on their sides—If damage is caused
there is cause of action against other.An owner of property is entitled to protect
himself against water which he has not brought
on his land himself. He is entitled to divert
water which threatens to do damage to his land.
Likewise, his neighbours have a right to protect
themselves against water which threatens to do
damage to their properties.Where the plaintiff and the defendant have
equal rights to protect their own properties by
turning the water which threatens to flow over
their lands in times of flood into a ditch, and in
consequence of that the combined water which
would otherwise have gone on to their respective
lands causes damage to the banks of the ditch
on either side, it is the business of both parties
to protect themselves against damage which
may result when there is an excess flow of water
in the ditch, and neither party can, in such a
case have a cause of action against the other. -
[P 208 C 1]*H. B. Gumaste*—for Appellant.*V. R. Sirur*—for Respondents.**Judgment.**—The plaintiff alleged that
a stream passed between his Survey
Nos. 638 and 639 in Gadag and the de-
fendants' lands to the south; that a road
passed to the east of the parties' lands;
that the water from the lands beyond
that road belonging to the Aoharyas of
Annigeri and Sortur alone passed to the
stream and none else; that a portion of
the rain water from the lands to the east
of defendants' lands passed into the de-
fendants' lands by certain passages
shown in the sketch, Ex. 62; that the
defendants dug earth from the road and
stopped the passages, with the result that
the water in the stream was thereby in-
creased and washed away the banks on
the plaintiff's side and caused him
damage.The lower Court granted the plaintiff
a decree directing the defendants to res-
tore the plaintiff's land to the extent to
which it had been washed away, as
marked in Ex. 63 in red pencil, and toplant *kalnars* or *devubalis* there to pre-
vent further washing away of the plain-
tiff's land. The Court refused to grant
an injunction against the defendants, but
stated that if the plaintiff found that
any other portion of his land was washed
away, he might take steps in execution
of this decree to ascertain what portion
was washed away and to get it restored.
There were various other directions in
the order.Both parties objected to the decree, but
in first appeal the Assistant Judge con-
firmed the decree of the lower Court.
Even now the plaintiff is not satisfied
with what he has got, while the defen-
dants have filed cross-objections, and
maintain that the lower Court ought to
have dismissed the plaintiff's suit.The position, even now, after all the
evidence has been taken is not perfectly
clear. But there is a ditch which runs
between the lands of the plaintiff on the
north and the lands of the defendants on
the south. It does not seem to be a na-
tural water-course, because it admit-
tedly stops at the road on the east. It
does not cross the road so as to drain
the lands which are on the east. The
lands slope from the east to the west.
It has been found that the rain water
which falls on the land to the east, when
there is a heavy fall of rain, flows down
the slope, across the road, and over the
lands of the respective parties. For very
many years the plaintiff has diverted the
water which would otherwise have flowed
across his land into the ditch, and while
only the water which would have flowed
over the plaintiff's land went into the
ditch, no damage was caused to the plain-
tiff's lands through the water flowing down
the ditch. The defendants thought they
would protect themselves in a like man-
ner from the water which flowed over
their lands from the lands of their eas-
tern neighbours, and so they built bands
on the road which prevented the water
from the eastern lands, flowing over their
lands, and turned that water into the
ditch. Owing to the increase of water
flowing down the ditch the banks of the
ditch on the plaintiff's side were washed
away. One should be able to see there-
fore from those facts what are the rights
of the parties. It has not been proved
to a certainty in whose ownership is the
ditch. One plan makes out that the
boundary of Survey Nos. 638 and 639

passes along the bed of the ditch. Another map makes it pass to the north of the ditch and it is not clear whether, as a matter of fact, any part of the ditch was included in the survey numbers belonging to either the plaintiff or the defendants. But the map which the learned trial Judge relied upon most, Ex. 63, shows that the ditch, if it belonged to either party, belonged to the defendants. Probably, it comes within S 37 of the Bombay Land Revenue Code, and, if so, it belongs to neither party. If that is so, both the plaintiff and the defendants had equal rights to protect themselves against water which threatened to come over their lands from the east.

As laid down in the case of *Nield v. London and North-Western Railway Company* (1), an owner of property is entitled to protect himself against water which he has not brought on his land himself. He is entitled to divert water which threatens to do damage to his land. Likewise, his neighbours have a right to protect themselves against water which threatens to do damage to their properties. In this case it seems to me that both the plaintiff and the defendants had equal rights to protect their own properties by turning the water which threatened to flow over their land in times of flood from the east, into this ditch. If, in consequence of that, the combined water, which would otherwise have gone on to the lands of the plaintiff and the lands of the defendants, caused damage to the banks of the ditch, then I would only say, it is the business of both parties to protect themselves against damage which may result when there is an excessive flow of water in the ditch.

In the case of *Nield v. London and North-Western Railway Company* (1) the defendants owners of a canal, being threatened by an overflow of flood water from a neighbouring river, and, fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiff's premises which were also situated

on the banks of the canal above the premises of the defendants, and being penned back by the planks the water rose in the canal until it flooded the plaintiff's premises. In an action brought to recover damage for the injury so caused, it was held that the defendants were not liable on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural water-course not to impede the flow of water down it.

Here therefore the defendants had not brought this water from the east. It came owing to the heavy rainfall. They were entitled to protect themselves just as the defendants in that case were entitled to protect themselves from an overflow of flood water from the neighbouring river. That seems to be a simple proposition of law which applies to this case, and therefore in my opinion the judgments of both the lower Courts were wrong.

The appeal is dismissed, and the cross-objections are allowed, and the suit dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 208

SHAH AND HAYWARD, JJ.

Ganpatrao Sultanrao Mahurkar—Appellant.

v.

Anandrao Jagdeorao Mahurkar—Respondent.

First Appeal No. 305 of 1916, Decided on 14th July 1919, from decision of First Class Sub-Judge, Ahmednagar, in Misc. Appln. No. 70 of 1915.

(a) Civil P. C. (5 of 1908), S. 47—Application for refund of excess money recovered in execution is one under S. 47.

An application for refund of a sum of money wrongfully recovered in execution proceedings can be entertained by the Court executing the decree, as such application raises a question relating to the execution of the decree within the meaning of S. 47 and in respect of which no separate suit can lie. [P 209 C 1, 2]

(b) Limitation Act (9 of 1908), S. 14—Suit instead of application for refund of excess money recovered in execution filed by mistake—Time spent in such suit can be deducted.

Where instead of applying to the Court executing a decree for refund of excess money levied in execution, a suit is under a bona fide mistake brought by the applicant he is entitled under S. 14 to deduct the time taken up in prosecuting

(1) [1875] 10 Ex. 4=44 L. J. Ex. 15=23 W. R. 60.

the suit in calculating the period for making an application for refund. [P 209 C 2]

Y. N. Nadkarni for K. H. Kelkar—
for Appellant.

D. R. Patwardhan and S. R. Gokhale
—for Respondent.

Shah, J. — This is an appeal from the order of the First Class Subordinate Judge of Ahmednagar on the application of the present appellant for a refund of Rs. 1,088-5-6 said to have been wrongfully recovered by the present respondent in execution proceedings in Dar-khast No. 1224 of 1906. The decree under execution was passed by the Subordinate Judge of Jhansi and transferred for execution to the Court of the First Class Subordinate Judge at Ahmednagar. The sum is said to have been improperly recovered by the respondent on or about 29th November 1910. A suit was filed in the Court of the Second Class Subordinate Judge of Shevgaon on 14th November 1913 to recover this amount. But that suit was dismissed on 31st March 1915, on the ground that no suit could lie and that the proper remedy was by way of an application under S. 47, Civil P. C. The present application was made to the Court at Ahmednagar on 19th May 1915. That Court has dismissed it on the ground that such an application in execution cannot lie and that it is time barred.

The correctness of this view is questioned before us on behalf of the appellant, and on behalf of the respondent it has been further argued in support of the order made by the lower Court, that that Court had no jurisdiction to entertain the application after the execution of the decree was over and that, if at all the application should have been made to the Court at Jhansi, which passed the decree.

The first question is whether this application for a refund of the sum can be entertained by the executing Court. According to the terms of S. 47, Civil P. C., all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree must be determined by the Court executing the decree and not by a separate suit. This application raises, in my opinion, a question relating to the execution of the decree and is clearly one which could be and ought to be entertained by the Court executing the

decree and in respect of which no separate suit can lie. This view is supported by the decision in *Partab Singh v. Beni Ram* (1), which was a decision under S. 244 of the Code of 1877 corresponding to S. 47 of the present Code. The application therefore was properly made to the executing Court. Further it is difficult to understand how the present respondent can be heard to urge this plea, after having successfully contended in the suit filed in the Court at Shevgaon that the proper remedy was to file an application under S. 47 of the Code for the refund and not to file a suit.

The second point is one of limitation. It has been held by the lower Court that on 19th May 1915 the application was time barred, as it was not made within three years from the date on which this payment in excess is said to have been made, i. e., from 29th November 1910. It is urged however on behalf of the appellant that under S. 14, Lim. Act, the time taken up in the prosecution of the suit at Shevgaon should be deducted and if that time were deducted, the application would be within time, as the Court was closed for the Easter holidays from 1st April to 6th April 1915 and for the summer vacation from 7th April to 18th May. The question therefore is whether the present appellant prosecuted the suit with due diligence and in good faith. I see no reason to doubt the good faith of the present appellant in filing the suit in the Court at Shevgaon and in attempting to recover the sum in those proceedings. It is not suggested that he did not prosecute the suit with due diligence. I am therefore of opinion that the time taken up in prosecuting the suit at Shevgaon ought to be deducted under S. 14, Lim. Act. The present application therefore is not time barred.

It is urged on behalf of the respondent that the execution being over long ago, the lower Court must have certified to the Court at Jhansi, which passed the decree, the fact of such execution under S. 41, Civil P. C., that thereafter it would have no jurisdiction to entertain such an application and that the application could be properly made to the Court at Jhansi. In order to ascertain whether the Court of the First Class Subordinate Judge at Ahmednagar had certified to the Court at Jhansi the fact of

(1) [1878-90] 2 All. 61.

execution as required by S. 41, Civil P. C., we called for the proceedings in the darkhast and the learned pleader for the respondent has practically given up that point as he has not been able to trace on the record any such certificate. It is not necessary therefore to consider the question whether in virtue of the provisions of S. 42 the Court of the First Class Subordinate Judge at Ahmednagar would have jurisdiction to entertain this application after it had certified to the Court at Jhansi the fact of execution. At any rate before the fact of execution is certified to the Court which passed the decree, the Court to which the decree is transferred for execution has jurisdiction to deal with an application like the present for a refund of the excess.

The learned Subordinate Judge has not decided the application on the merits in favour of the respondent, though it is claimed for him that it is a decision on the merits. In view of the observations made by the learned Judge in the last but one paragraph of his judgment it is clear that he has not decided the application on its merits.

As both the preliminary grounds upon which the lower Court disposed of this application fail, I think that the application must be remanded for disposal according to law.

I would therefore set aside the order of the lower Court and send back the application for disposal according to law.

Costs to be costs in the application.

Hayward, J.—I agree. The ascertainment of the facts is essential to a correct determination of the question whether an excess was or was not levied in execution and the matter must for that purpose be remanded for a further trial to the First Class Subordinate Judge at Ahmednagar.

The application was in time because the excess, if any, was levied on 29th November 1910 and a suit was by bona fide mistake brought on 14th November 1913 and was pending until 31st March 1915 in the Subordinate Judge's Court at Shevgaon. It was not possible to take further steps until 19th May 1915, owing to the intervention of the Easter holidays and the summer vacation, in the First Class Subordinate Judge's Court at Ahmednagar. It has been ascertained that no certificate has so far been sent to the decretal Court by the First Class Subordinate Judge at Ahmednagar under

S. 41, and that therefore the jurisdiction to try the matter has still been retained by the First Class Subordinate Judge at Ahmednagar under S. 42, Civil P. C. The question whether the excess has or has not been levied in execution would in my opinion undoubtedly be a question relating to the execution of the decree within the meaning of S. 47, Civil P. C.

G.P./R.K.

Order set aside.

A. I. R. 1920 Bombay 210

MACLEOD, C. J. AND FAWCETT, J.

Ganga Rama Bhilare — Defendant—Appellant.

v.

Sakharam Babaji Vani — Plaintiff—Respondent.

Second Appeal No. 760 of 1919, Decided on 20th July 1920, from decision of Asst. Judge, Satara, in Appeal No. 151 of 1919.

Specific Relief Act (1 of 1877), S. 27—Contract of sale after devise—On testator's death contract can be enforced against devisee.

Where a person makes an agreement to sell property which he has already specifically devised and dies before the sale takes place, the vendee is entitled to enforce the agreement specifically against the devisee and to obtain a conveyance from him. [P 211 C 1]

S. R. Bakhale—for Appellant.

Coyajee, P. B. Shinghe and J. C. Rele—for Respondent.

Macleod, C. J.—The plaintiff instituted this suit for obtaining specific performance of an agreement to sell the property in suit passed by Janu, the original defendant 1, on 31st August 1916. Janu died pending the suit. His daughter was substituted in his place as his heir. She admitted the plaintiff's claim, but defendant 2, daughter of Janu's son, contended that at the time of the agreement Janu had become too senile and imbecile to understand the nature of the agreement and that he had bequeathed all his property to her by his will dated 25th June 1911. The trial Court decided that defendant 1, as the heir of Janu, must give the plaintiff a proper conveyance within one month, that defendant 2 had no interest in the plaint property and that the consideration to be paid by the plaintiff should go to defendant 1. In appeal this decision was confirmed.

It is not now contended that the agreement to sell should be set aside on the ground that Janu was unable to under-

stand the nature of the agreement. The real question is, what was the effect on the property brought about by the agreement to sell and what is the proper construction of the document executed by Janu on 25th June 1911? As regards that document, I think it must be taken as devising specifically to Gangu certain properties including the property in suit and as the document does not contain any residuary bequest, if Janu had disposed of any of the properties mentioned in that document during his lifetime the sale proceeds, if they had not been deposited in house No. 11 would have belonged to the residuary estate and would go to his heir. We have in this case an agreement by a testator to sell a house specifically devised by his will, and the testator dying before the agreement to sell had been executed. S. 54, T. P. Act, says that a contract for the sale of immovable property does not create any interest or charge on such property, but it gives a right to the purchaser to get a conveyance for payment of the purchase money. Under S. 27, Specific Relief Act such a contract may be enforced by a purchaser against a person entitled to the estate of the deceased. The only question then would be whether the purchaser in this case should claim a conveyance from the heir or from the specific devisee. But for the contract of sale this house would have gone to Gangu absolutely. It appears to me that it goes to her with the obligation to fulfil the contract of the testator and to pass a conveyance of the house to the purchaser on receipt of the purchase money. The case of *Farrar v. Winterton* (1) has been cited, but there the decision turned on an important difference between the English and Indian law, viz. that the testatrix, having entered into a contract to sell, parted with her beneficial interest in the land so contracted to be sold.

That decision therefore cannot apply in this case, as the contract to sell created no interest in the purchaser of the property and the beneficial interest remained with Janu. It might be argued that the contract to sell the property specifically devised amounted to a revocation of the specific devise. But that would only result if the contract had

been carried into execution. The entry into the contract may have shown an intention to revoke the legacy, but it would amount to nothing more.

Therefore in my opinion the plaintiff is entitled to succeed. The decree of the trial Court must be amended by stating that defendant 2 must give the plaintiff a proper conveyance within one month from the date the papers are returned to the lower Court. The consideration will be paid by the plaintiff to defendant 2.

Plaintiff will deduct all his costs throughout from the purchase money, and the other parties will bear their own costs.

Fawcett, J.—It has been ruled by the Privy Council in *Maung Shwe Goh v. Maung Inn* (2) that S. 54, T. P. Act, prevents the purchaser under an inchoate contract, which remains unperformed, being treated in India as the owner in equity of the estate as he would be treated in England, and therefore the case of *Farrar v. Winterton* (1), relied on by respondent No. 2's counsel, cannot apply to this case.

I would add also that the principle of redemption of legacies, which is reproduced in S. 139, Succession Act, would not apply to this case, because that depends upon the property specifically bequeathed having been converted into property of a different kind, and it has been ruled—if authority is necessary on such a point—that a direction to sell not carried out till after the testator's death will not affect a redemption: *Harrison v. Asher* (3). I concur therefore in the order proposed by the learned Chief Justice.

G.P./R.K.

Decree amended.

(2) A. I. R. 1916 P. C. 189=44 Cal. 542=44 I. A. 15=38 I. C. 938 (P. C.)

(3) [1848] 2 De G. & Sm. 436=17 L. J. Ch. 452=12 Jur. 833=79 R. R. 280=64 E. R. 196.

A. I. R. 1920 Bombay 211

SHAH AND HAYWARD, JJ.

Sorab Merwanji Alpaivalla—Accused
—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 186 of 1919,
Decided on 7th August 1919, from conviction and sentence passed by Chief Presidency Magistrate, Bombay.

(1) [1842] 5 Beav. 1=6 Jur. 204=59 R. R. 392=49 E. R. 476.

Bombay Tramways Act (1 of 1874), S. 24—Modification of by-law under S. 24 must be sanctioned by Governor-in-Council.

A notice issued by the Bombay Tramway Company modifying a by-law framed by the Company under S. 24 has no legal effect unless it is duly sanctioned by the Governor-in-Council. [P 213 C 1]

G. N. Thakor—for Applicant.

Campbell and Vicaji—for the Company.

Shah, J.—The petitioner before us was charged before the Chief Presidency Magistrate with the breach of two by-laws under the Bombay Tramways Act (Bombay Act 1 of 1874). It was alleged against him that he did not leave a tramcar when asked to do so, even though the interior of the car contained the full number of passengers; and secondly, that he travelled on the rear platform of the tramcar contrary to the provisions of by-law No. 6.

The trial Magistrate has found the accused guilty of both the charges, and sentenced him to pay fines in respect of those charges.

The facts are not in dispute. On 4th March last the petitioner was found standing on the rear platform of a tramcar near Bori Bunder when, it may be taken for the purposes of the present petition, the tramcar was full. He was asked to leave the car, but he refused to do so, and hence the prosecution. The by-laws in question have been framed under S. 24, Bombay Tramways Act. The Bombay Electric Supply and Tramway Co. Ltd., who are in the position of grantees under the Act in virtue of the provisions of S. 31 of the Act, have power to make regulations from time to time under S. 24 of the travelling in or upon any carriage belonging to them; and for better enforcing the observance of all or any such regulations it is lawful to the grantees, subject to confirmation thereof by the Governor-in-Council, to make by-laws for any of the purposes mentioned in the section and from time to time repeal or alter such by-laws. The by-laws, including by-laws Nos. 6 and 7, were duly confirmed by the Governor-in-Council, and published as required by the section. Subsequently in February 1917, a notice to passengers was issued by the Traffic Manager of the Company allowing until further notice three passengers, who may wish to do so, to stand on the rear

platform of all cars excluding the front car of a two-car tram. In February 1919, however this notice was in effect cancelled and a new notice to passengers was issued by the Managing Director under which only three persons (in addition to any Conductor or Inspector on duty there) belonging to any of the four classes of persons mentioned in the notice were to be permitted to stand on the rear platform of a tramcar, and passengers other than those mentioned in the first clause of the notice or in excess of the prescribed number were prohibited from standing on the rear platform and were told that any passenger acting contrary to the terms of the notice would render himself liable to removal and to prosecution under the Company's by-laws.

Both these notices have been quoted in the judgment of the lower Court. It is an admitted fact that neither the first notice of February 1917 nor the second notice of February 1919 was confirmed by the Governor-in-Council. It is argued on behalf of the petitioner that the first notice must be assumed for the purpose of this application to have been validly issued and must be taken to have effected a modification of by-law No. 6; and that the second notice issued by the Tramway Company is illegal so far as it modifies the first notice. On the other hand it is argued that neither notice has any legal validity so far as it modifies by-law No. 6 and that any person offending against by-law No. 6 can be proceeded against according to law. It is further argued on behalf of the Company that under S. 24, apart from the by-laws, the Company has the power to make regulations for travelling in or upon any carriage and that though these notices may not have the force of by-laws any breach of which is punishable under the Act, in so far as neither notice is restrictive of any right of a passenger travelling by a tramcar, they were properly issued by the Tramway Company in order to regulate the traffic. The terms of by-law No. 6 providing that no person shall travel on the platform of any car are clear, and the act of the accused is clearly contrary to the terms of this by-law. His action is not contrary to the terms of the notice of February 1917, but that notice was cancelled in February 1919, and as a matter of fact the peti-

tioner has acted in contravention of the terms of the second notice. In the view I take of these notices it is unnecessary to consider whether the accused would be justified in standing on the rear platform as he did either under the first notice or under the second notice. In my opinion both these notices within certain limits involve a modification of by-law No. 6 and to that extent require the confirmation of the Governor-in-Council under S. 24 to have any legal effect. As the modifications of the by-laws involved in these notices have not been confirmed by the Governor-in-Council, for the purposes of this case it must be taken that neither the first notice nor the second notice existed. The propriety of the act of the accused under Tramways Act must be judged with reference to the terms of by-law No. 6; and it is clear on the facts that he acted contrary to the terms of that by-law.

As these two notices to passengers have been discussed before us, I think it is right to point out that when a rule in the terms of by-law No. 6 is framed and when any modification of that rule is contemplated, it is but right that it should be made in the manner provided by law, that it should be duly confirmed by the Governor-in-Council and published as required by S. 24. In practice such notices involving modification of any by-law without such confirmation are apt to mislead the travelling public. For instance under the first notice the passengers would naturally be under the impression that so long as the number mentioned in the notice is not exceeded, any person can stand on the rear platform, though even then every one of the three persons other than the servants or officers of the Company would be offending against by-law No. 6; and under the second notice, so far as it refers to classes of persons other than the servants or officers of the Company in the first clause, the result would be the same, i.e., any such person not being a servant or officer of the Company would be offending against by-law No. 6, even though he may be permitted to stand on the rear platform under the notice. That is a state of things brought about by these notices, which is not desirable as it in effect involves a differential treatment of persons offending against by-law No. 6.

The other two points raised on behalf

of the petitioner may be briefly dealt with. The first is that these rules were not put up in a conspicuous place inside the tramcar as required by S. 17 of the Act and by-law No. 28. It is clear however that the consequence of not properly complying with these provisions is not specified, and I do not think that any noncompliance by the Company with this provision can afford any valid answer to the charge against the petitioner. I do not express any opinion as to whether the by-laws were put up in a conspicuous place inside this particular car as required by the Act. The Magistrate's finding on this point is rather halting; but for the purpose of this petition it is not necessary to examine that finding.

The second point urged on behalf of the petitioner is that the terms of the second notice are unreasonable. I do not think that the question really arises for our consideration, as by-law No. 6 remains unaffected thereby. In so far as the notice purports to modify the operation of by-law No. 6, it requires the confirmation of the Governor in Council, which has not been obtained.

The last point urged on behalf of the petitioner is that in any case the conviction under by-law No. 7 is not justified under the circumstances. Taking by-laws Nos. 6 and 7 together, it seems to me that by-law No. 7 contemplates a person remaining in the interior of a car, when the car contains the full number of passengers for which accommodation is provided in such interior. No doubt it provides that the person, when asked to leave the car, shall do so. But it seems to me that in the present case the accused never got into the interior of the car and was throughout standing on the rear platform. His action therefore properly falls within the scope of by-law No. 6 and is outside the scope of by-law No. 7. In any case his act amounted to a breach of by-law No. 6 and he could not be properly convicted in respect of the same act under the following by-law.

I would therefore set aside the conviction and sentence in respect of the charge under by-law No. 7 and direct the fine, if paid, to be refunded. I would confirm the other conviction and sentence.

Hayward, J.—I concur. The accused has, in my opinion, been rightly convicted of the offence of refusing to get down from the platform of the car when so requested under by-law No. 6, but he has, in my opinion, been wrongly convicted of remaining in the interior of the car when requested to go out under by-law No. 7 of the by-laws under Ss. 24 and 25, Bombay Tramways Act 1 of 1874.

The accused was admittedly travelling on the platform which has been treated, it seems to me, as outside the car by by-law No. 6. He never entered the interior of the car, which would seem to me not to include the platform according to the ordinary meaning of the words used in by-law No. 7. The conviction was therefore in my opinion right under by-law No. 6 but wrong under by-law No. 7 of the by-laws confirmed by the Governor-in-Council under Ss. 24 and 25, Bombay Tramways Act 1 of 1874.

It has however been urged that the prosecution was invalid, because notice had been issued in February 1917 by the Tramway Company, stating that owing to shortage of cars they did not intend to enforce the by-law prohibiting passengers from travelling on the platform pending further orders during the war, and it has been urged that it was not open to them, after having once issued that notice, to modify it by the subsequent notice of February 1919, in which they intimated that they intended in future to enforce the by-law more strictly and only to permit the privilege to some specified persons, mainly officials of the police and the Company, as they had obtained a further supply of cars since the end of the war. It has however not been disputed that neither of these notices could have had the legal effect of modifying the by-law, because neither of these notices had been confirmed by the Governor-in-Council as required under Ss. 24 and 25, Bombay Tramways Act 1 of 1874. It is not necessary to discuss what the position would have been if contrary to their notices an unsuspecting passenger had been prosecuted for travelling on the platform by the Tramway Company, because that is not the case here, and it would be exceedingly improbable that any such prosecution would be instituted by a responsible body like the Tramway Company.

The case here is a perfectly simple one. The offender had full intimation of the withdrawal of the previous privilege; he was shown the notice intimating that the by-law would in future have to be more strictly enforced; he nevertheless deliberately with full knowledge of the position refused to comply with the perfectly reasonable and legitimate demands of the officers of the Tramway Company. This therefore in my opinion, is not a case in which the offender is entitled to any sympathy. It was entirely his own fault. He acted with full knowledge that he was liable, if he disobeyed the request of the officers, to prosecution under the by-laws that had been sanctioned and never modified by the Governor-in-Council under Ss. 24 and 25 Bombay Tramways Act 1 of 1874.

It seems to me therefore that it is incumbent on us to confirm the conviction and sentence of Rs. 20 for the offence against the by-law No. 6, but on the other hand to reverse the conviction and direct the repayment of the fine of Rs. 15 inflicted under by-law No. 7 of the by-laws as confirmed by the Governor-in-Council under Ss. 24 and 25, of Bombay Tramways Act 1 of 1874.

G.P./R.K.

Order accordingly.

A. I. R. 1920 Bombay 214

MACLEOD, C. J. AND HEATON, J.
Surat City Municipality—Appellant.

v.

Maneklal Ichharam & Co.—Respondent.

Second Appeal No. 384 of 1919, Decided on 12th February 1920, from decision of Asst. Judge, Surat, in Appeal No. 92 of 1918.

Bombay District Municipal Act (3 of 1901), S. 59 (b) (2)—For purpose of wheel-tax vehicle must be both kept and used within limit.

In order to be liable to wheel-tax under Cl (b) (ii), S. 59, Bombay District Municipal Act, a vehicle must be both kept and used within the district. A vehicle kept outside, but used within a district is not liable to wheel-tax under the section. [P 215 C 1]

N. K. Mehta—for Appellant.

G. N. Thakor—for Respondent.

Macleod, C. J.—The defendant Municipality sought to levy a tax on the plaintiffs' vehicles on the ground that they were empowered to do so under S. 59 (b) (ii), Bombay District Municipal Act. Their argument seems to have been that every cart kept outside the

District was liable to be taxed if it happened to be used within the district; that is to say, that every cart kept outside for use in the district was liable to a tax. That by itself is putting a strained meaning on the words of the subsection "kept for use within the district." But if sub-S. (ii) were in any way obscure, its meaning is made perfectly plain by sub-S. (iii) which refers to vehicles, boats, or animals used for riding, draught or burden, which enter the district, but are kept outside. The Municipality are entitled to levy a toll on such vehicles and animals whether loaded or unloaded.

Then, we are told that the Municipality have made rules whereby they only levy a toll on loaded vehicles. But sub-S. (iii) especially says that such vehicles and animals which are used for riding, draught or burden, and enter the district, are not liable to taxation under sub-S. (ii). We are asked to read for the word "but," the word "if." If that were so, then it would mean that there were two classes of vehicles and animals kept outside, but used within the district, some of which would be liable to taxation under sub-S. (ii), while the rest would not be liable. But there is no provision whatever in the section for distinguishing these two classes. In my opinion therefore the judgment of the lower appellate Court was perfectly correct and, as long as the plaintiff kept his carts outside the district, he was only liable to pay toll when they entered the district, and he was only liable for toll under the Municipal rules if his carts were loaded. Therefore, the appeal is dismissed with costs.

Heaton, J.—I agree.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 215 (1)

MACLEOD, C. J. AND HEATON, J.

Manilal Dalpatram—Receiver—Appellant.

v.

Nandlal Keshavlal and others—Plaintiffs—Respondents.

Second Appeal No. 513 of 1917, Decided on 10th October 1919, from decision of Asst. Judge, Ahmedabad, in Appeal No. 86 of 1915.

Landlord and Tenant—Lease for number of years with covenant of renewal at lessee's option—Lessee continuing in possession with-

out asking for renewal continues as annual tenant.

Where a lease for a term of years provides for its renewal on the expiration of the period at the opinion of the lessee on the same conditions and the lessee fails to ask for such renewal, he continues thereafter as an annual tenant.

[P 215 C 2]

I. N. Mehta and H. V. Divatia—for Appellant.

G. N. Thakor—for Respondents.

Judgment.—This case was rightly decided by the lower appellate Court. The original defendant, who is now an insolvent, took a lease from the plaintiff in 1894 for seven years and it was agreed that if on the expiration of the period the lessee again intended to keep the field on santh from the lessor, the lessee might keep the field on santh on the same conditions. That meant that in 1901, when the first term expired, the tenant had a right or the option to ask for a renewal for another seven years. The case of *Purmanandas Jeewandas, In re* (1) is more directly in point than the English authorities we are referred to. Clearly, whatever rights the appellant had between 1901 and 1908 to ask for specific performance of the agreement to extend the lease for another seven years, those rights must have come to an end after 1908. Thereafter he continued as an annual tenant. In any event no notice was given that he wanted to set up any such right as is claimed by the receiver of his estate. The appeal therefore must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

(1) [1883] 7 Bom. 109.

A. I. R. 1920 Bombay 215 (2)

MACLEOD, C. J. AND HEATON, J.

Manak—Defendant—Appellant.

v.

Narayan—Plaintiff—Respondent.

Second Appeal No. 472 of 1917, Decided on 7th August 1919.

Bombay Land Revenue Code (5 of 1879), S. 121—Effect of fixing boundaries under S. 121 stated—It does not take away right to claim by adverse possession.

The fixing of boundaries of different survey numbers by the Collector under S. 121 has the effect merely of showing what land belongs to the persons in whose names the survey numbers are registered. It does not affect the right of any one of those persons to show in a civil Court that he has acquired a title by adverse possession against a registered occupant.

[P 216 C 1]

Macleod, C. J.—The plaintiffs sued to recover possession of 4 acres of land

out of Survey No. 676 situated in Thalner alleging that he owned Survey No. 678 which is adjoining Survey No. 676 that the plot in dispute was separated from Survey No. 676 by a bandh and included in his survey number, that he had been in possession of the plot in dispute for about 50 years; that Survey No. 676 was measured about 12 months ago at the request of the defendant by the revenue authorities; that they found out that the plot in dispute formed part of Survey No. 676 which belonged to the defendant and that accordingly, he was dispossessed by the defendant in July 1915. He claimed that he had acquired title to the plot in dispute by adverse possession, and prayed therefore that possession might be restored to him.

It has been found in both Courts that the plaintiff had been in possession adversely of the plot in dispute for more than 12 years. But it has been contended that the order of the revenue authorities adjusting the boundaries of Survey No. 676 was a bar to the present suit. We cannot agree with that contention. Reliance has been placed for the argument on S. 121, Land Revenue Code. But it does not follow that, because the Collector placed the boundary mark of Survey No. 676 at the place where it ought to be in accordance with the survey map, that he in any way adjudicated upon the plaintiff's claim to be possessed of the plot in dispute by adverse possession. It is quite true that the fixing of the boundaries of these two survey numbers would show what land belonged to the persons in whose name survey numbers were registered. But that would not in any way affect the right of any one of those parties to show in a civil Court that he had acquired a title by adverse possession against a registered occupant. I agree therefore with the opinion of the learned Assistant Judge that the order of the Deputy Collector, adjudging that the plot in suit formed part of Survey No. 676, does not at all stand in the way of a civil Court going into the question of adverse possession. Therefore I think the order of the lower appellate Court was right and the appeal must be dismissed with costs.

Heaton, J.—I also think that the appeal must be dismissed with costs. The words of sub-S. (b), Cl. (1), S. 121, Land Revenue Code, are not perfectly clear,

and are not free from difficulty. They might be construed as meaning that, when the Collector has determined the boundary, he has also determined all the rights of ownership. But I do not think that this is what they do mean, and I do not think it is what the words express, when we remember that they appear in the Land Revenue Code. The words are these :

“The settlement of a boundary shall be determinative of the rights of the landholders on either side of the boundary fixed in respect of the land adjudged to appertain, or not to appertain to their respective holdings.”

I think the rights that are finally determined by the fixing of the boundaries are those rights which flow from the fact that the land is incorporated in a particular survey number, and I do not think they mean more than this. Land may be in one survey number, and yet may become by adverse possession the property of the owner of an adjoining survey number. That is what is found to have happened in this particular case. I think the Land Revenue Code itself provides the very soundest reasons for taking this view. In giving to the revenue authorities power to fix the boundary it says in S. 119 that :

“the boundaries would be fixed by the Collector who shall be guided by the land records, if they afford satisfactory evidence of the boundary previously fixed, and if not by such other evidence as he may be able to procure.”

It is quite inconceivable to me that those words should have been used had anything more been intended than that the Collector should fix the boundary and so determine finally what land is to be incorporated in a particular survey number. He is not to inquire into the rights of ownership, but is to inquire into the position of the boundary, and nothing else. That being so, it is, to my thinking, quite impossible to suppose that the words of sub-S. (b) gave to the Collector's decision a finality as regards those rights of ownership which are not dependent on the circumstances whether the land does or does not form part of a particular survey number.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 217
MACLEOD, C. J. AND PRATT, J.
Emperor

v.

Sakharam Manaji Vanjari—Accused.
 Criminal Appeal No. 86 of 1919, Decided on 7th June 1919, from order of acquittal passed by Sess. Judge, Nasik.

(a) Criminal P. C. (5 of 1898), S. 417—Power to appeal against acquittal is discretionary—Exercise of discretion is not subject to High Court's control.

The power of appeal under S. 417 should be exercised sparingly by the Government. The discretion to exercise that power however is not subject to the control of the High Court, and, where in such an appeal, the Court is of opinion that the lower Court has acted on an erroneous view of the evidence, and that it should have convicted the accused, it has no jurisdiction to refuse to convict. [P 219 C 1]

(b) Criminal Trial—Appeal—No distinction between appeal against conviction or acquittal.

As between an appeal against an acquittal and an appeal against a conviction, the Criminal Procedure Code makes no distinction. [P 219 C 1]

S. S. Patkar—for the Crown.

D. R. Patwardhan—for Accused.

Judgment.—The accused *Sakharam Manaji Vanjari* was tried for the murder of *Vithi*, wife of *Bhika Gangaram*, and was acquitted by the Sessions Judge of Nasik. This is an appeal by the Government of Bombay under S. 417 against the acquittal.

Vithi was a young woman aged 18, who lived with her husband *Bhika Gangaram* at the village of *Wadgaon*, a few miles from *Deolali*. Her husband worked as a cartman at *Deolali*. On 8th September, the husband says *Vithi* came in the morning to *Deolali* and left him his food and fodder for his bullocks and a message that she would return in the evening with his dinner. After his work he returned to *Deolali Station* at 3 p. m. expecting her to arrive. She did not come. He went home and found that she had not returned home after her visit to *Deolali* that morning. He searched for her that night and next morning without success and at 4 p. m. on the 9th learnt that her corpse had been found in the bed of a *nalla* between *Wadgaon* and *Nanegaon* on the way from *Deolali*. He went there with the *Wadgaon Patil*, who sent for the *Nanegaon Patil* as the place was within the boundary of the village of *Nanegaon*. He then went back to *Wadgaon* in the evening and learnt from the womenfolk that *Yama* had a clue to

the murder. He found *Yama* at his house at 4 p. m. and after much persuasion *Yama* told him that *Bhika Raoji* had said that accused and *Pandu* had committed the murder. He looked for *Bhika Raoji*, but could not find him and returned to the scene of the murder at 11 p. m. By that time the *Nanegaon Patil* had arrived and later about 2 p. m. the Sub-Inspector came there. The Sub-Inspector made an inquest in the morning of the 10th. He did not take the statement of the husband till the afternoon after he had gone on to *Wadgaon*. He did not find *Yama*, *Bhika*, *Pandu* and the accused till the 11th. On that evening he arrested the accused.

Now there is no doubt that *Vithi* was murdered in the *Nalla* bed. Her throat was cut. There was much blood on the ground near the corpse and there were other marks of violence. Broken pieces of bangles and of a necklace were lying 9 or 11 paces from the corpse and the body had been dragged from there to the place where it was found. The motive for the murder was not robbery, for the woman's ornaments had not been touched. The 'kasota' however had been loosened and there can be no doubt that the unfortunate woman had been ravished and murdered.

Bhika Raoji is the most important witness in the case. His field is 500 paces from the *nalla* bed where the corpse was lying. He says that on the morning of the 8th while ploughing his field he saw four men from *Wadgaon*, the accused, *Pandu*, *Narayan* and *Ramji*, carrying head loads of grass pass by the path alongside his field, cross the *nalla* and sit down to rest on a hillock which is 100 paces from the further bank of the *nalla*. He saw a woman coming from towards *Nanegaon*. He says that she passed the four men, halted, looked back and proceeded on her way towards the stream. He says that *Narayan* and *Ramji* got up and went on their way towards *Nanegaon*. The accused, he says, ran towards the *nalla* and like the woman went out of sight in the *nalla* bed. *Pandu* then followed and stood on the far bank of the *nalla*. He says that *Pandu* then returned, picked up his load and went on towards *Nanegaon*; and after him the accused came out of the *nalla* bed and did the same. But as the woman did not appear, he felt suspicious.

ous, went to the nalla bed and saw that she had been murdered there. He was terrified and went and told Yama and Ramchandra, who were in their field beyond his, that a murder had been committed in the nalla bed by Pandu and the accused Sakharam. All these three went away without going to the scene of the crime or giving the alarm. That is not surprising, for the average villager has little sense of civic duty and is much afraid of being mixed up in a police case.

There can be no doubt however that the main facts of Bhika Raoji's story are true. Narayan was called as a witness and he says that he, Ramji, Pandu and the accused rested with their head-loads on a hillock, that Vithi passed them, that he spoke to her and that as she went on to cross the river bed, he and Ramji left. The Sessions Judge has believed this witness. His evidence establishes that the accused and Pandu were left near Vithi at the place where she was murdered and at the time of her murder.

Now Pandu admits that he was at the hillock with Narayan, Ramji and the accused, that Vithi passed them, that Narayan and Ramji went on and, he says :

"Then Sakharam the accused followed her and obstructed her near the bank of the dry stream. She shouted and I went towards her. When I reached the bank of the river, I saw that Vithi was lying on her side in the dry bed of the stream. Sakharam was standing and was holding her. He put one hand on her neck and the other on her thigh. Accused was stopping at the time. I remonstrated saying she had done him no harm. Thereupon he took out a knife from his pocket. I saw the blade. He told me if I shouted or made noise he would kill me. When this was going on, I saw Vithi's face. She was struggling to get up. I then went away after Narayan and Ramji as the accused's threat frightened me."

But though he says he went away because he was frightened, Pandu admits that he went on with the accused and joined Narayan and Ramji at the Darna river on their way, where they bathed. He also went on with the accused to Deolali Station and he was seen with the accused in a hut near Deolali Station at 3 p. m. that day by Vithi's husband, who was there waiting for his wife. There can be no doubt that Pandu was an accomplice in the murder. He is a distant relation of Bhika Raoji and the Sessions Judge thinks that Bhika Raoji is trying to shield Pandu when he says that Pandu

did nothing but look on from the bank. We agree. We also agree with the Sessions Judge that if the Sub-Inspector had taken the trouble to question the husband as soon as he arrived at the scene of offence, and to secure the evidence of Bhika Raoji earlier, he would probably have told the whole truth. But if Bhika Raoji is trying to screen Pandu, does it follow that his evidence against the accused was false? We think not. Bhika Raoji first said to Yama and Ramchandra that Pandu and Sakharam committed the murder. That was before he had time to think of screening his relation and that was probably the truth. The Sessions Judge has acquitted the accused, because he thinks that Pandu may have committed the murder without the assistance of Sakharam, and that Bhika Raoji may have interchanged the parts played by Pandu and Sakharam. But Pandu is only a boy of 18 and we think it incredible that he committed the murder single handed. Again, the theory that there was one man on the bank who was an innocent onlooker is one that we cannot accept.

It was only invented by Bhika Raoji in order to screen Pandu. Both Pandu and the accused were left with Vithi. Both were together for the rest of the day, at any rate up to 3 p. m. We feel no doubt that the outrage was committed by both of them. In spite of the delay in securing their evidence we feel sure that Yama and Bhika Raoji are not tutored witnesses. Yama says he told no one until questioned by the husband. But the husband says he had been told that Yama had a clue. This discrepancy would not be present if the evidence was tutored. Yama probably did say something to his womenfolk and that is how news generally spreads in villages. Yama admits that he first told the husband he knew nothing, so anxious was he to keep out of the case. Yama and Ramchandra if they were false witnesses, would certainly have said that they had seen accused Pandu, Narayan and Raoji pass by their field. They did not see them, because their field is further away than Bhika Raoji's and because they were at that time sitting down and having their breakfast. There were no bloodstains on the accused; but he bathed in the Darna river soon after the murder and if there were probably two murderers, the

woman would have been so overpowered that it would have been possible for the murderers to avoid bloodstains. The accused has called two witnesses, who say that he was in Deolali on that morning. This sort of evidence is easily fabricated and we do not believe it.

There is clear evidence that the accused was present at the time of the murder coupled with the evidence of Pandu and Bhika Raoji. We have no doubt that the accused and Pandu were the murderers.

Mr. Patwardhan has suggested that we should not interfere even if we disagree with the Sessions Judge, for his conclusions are not unreasonable and perverse. But the cases of *Queen-Empress v. Bibhuti Bhusan Bit* (1) and *Queen-Empress v. Karigowda* (2) are a sufficient answer to this argument. The Code makes no distinction between an appeal against conviction and an appeal against acquittal. In an appeal against acquittal if this Court thinks the lower Court has taken an erroneous view of the evidence and should have convicted, it has no jurisdiction to refuse to convict. The power of appeal under S. 417 is one that should be exercised sparingly by Government, but the discretion to exercise that power appertains to Government and is not subject to control by this Court.

We are satisfied with the guilt of the accused. We reverse the order of acquittal and convict the accused Sakharam Manaji of the offence of murder under S. 302, I.P.C. But as he had been acquitted by the lower Court, we refrain from inflicting the capital sentence. We sentence the accused, Sakharam Manaji to transportation for life.

G.P./R.K.

Appeal accepted.

(1) [1890] 17 Cal. 485.

(2) [1895] 19 Bom. 51.

A. I. R. 1920 Bombay 219

MACLEOD, C. J.

Parvati Devanna Jagadal and others
—Defendants—Appellants.

v.

Shrinivas Ramchandra Patil—Plaintiff—Respondent.

Second Appeal No. 654 of 1918, Decided on 26th September 1919, from decision of Dist. Judge, Belgaum, in Appeal No. 201 of 1917.

(a) **Hindu Law—Maintenance — Widow—Maintenance is personal right—Charge can be created only by Court or by instrument.**

A claim for maintenance by a female member of a joint family is a personal claim against members of the family, and can only be made a charge on the family property by an order of the Court or by a properly executed document.

[P 220 C 1]

(b) **Hindu Law—Maintenance—Widow—Bonafide transferee from competent member takes it free of maintenance claim.**

Generally speaking, the transferee of joint property from the properly authorized member of a joint family takes that property free of any claims to maintenance by female members of the family.

[P 220 C 1]

(c) **Hindu Law—Maintenance—Widow will not be ordinarily divested unless maintenance is secured.**

A Court will not allow an heir to recover family property from a widow, entitled to be maintained out of it, before securing proper maintenance for her.

[P 220 C 1]

(d) **Transfer of Property Act (4 of 1882), S. 39—Bonafide transferee whether with or without notice is not bound by any personal claims against his vendor.**

When a person entitled to dispose of family property not charged with any maintenance disposes of that property in favour of an innocent purchaser without notice of any personal claims imposed on the transferor there is no obligation upon the vendee to fulfil the personal obligations of his vendor, and this would be so even if he had such notice.

[P 220 C 1]

Y. N. Nadkarni for *K. H. Kelkar*—for Appellants.

A. G. Desai—for Respondent.

Judgment.—This second appeal includes little else except questions of fact. The defendants claim as transferees from Bhagawa, the widow of Ramappa, alleging that she relinquished absolutely her life estate in her husband's property in favour of defendant 1, her mother-in-law. Admittedly there is no transfer of the widow's interest in writing. An attempt has been made to prove it by oral evidence. But even supposing that this evidence were admissible to prove a transfer, the Court has held as a matter of fact that the relinquishment is not proved. I myself should very much doubt whether it could be held that the widow could entirely relinquish her life estate in her husband's property merely by making an oral statement before the Mamlatdar, or agreeing to the transfer of the khata to the transferee's name. Then it has been proved that although Bhagawa gave her age as 20 when she made the statement before the Mamlatdar, as a matter of fact she was a minor at the time. Therefore it seems obvious that even if as a matter

of fact there was a relinquishment, if it was done by a widow who was a minor, the decision of both Courts was correct. The appeal must be dismissed with costs.

The respondent-plaintiff filed cross-objections to that part of the decree of the learned appellate Judge which laid down that the plaintiff took the property awarded to him subject to the obligation to provide sufficient maintenance to defendant 1 and directed that the Subordinate Judge should determine what was proper and sufficient maintenance for the defendant, and should secure the same for her benefit. I think that Mr. Desai is right when he says that the plaintiff purchaser from defendant 6, the adopted son of Bhagawa, took the property free of all claim for maintenance by defendant 1. It is settled law now that a claim for maintenance by a female member of a joint family is a personal claim against members of the family, and can only be made a charge on the family property by an order of the Court or by a properly executed document. Generally speaking, the transferee of joint property from the properly authorized member of a joint family takes that property free of any claims to maintenance by female members of the family. The case referred to by the learned appellate Judge, *Yellawa v. Bhimangavda* (1), lays down an equitable principle that a Court will not allow the heir to recover the family property from the widow, entitled to be maintained out of it, before securing proper maintenance for her. That decision is founded on the equity that the heir is personally bound to maintain the widow, and if the Court allows him to recover the property from the widow, he must in equity secure the widow's rights to maintenance. But it is an entirely different question when a person entitled to dispose of family property not charged with any maintenance disposes of that property in favour of an innocent purchaser without notice of any personal claims imposed on the transferor. Even if he had such notice, I apprehend there would be no obligation upon him to fulfil the personal obligations of his vendor. Therefore in my opinion the decree of the lower appellate Court must be amended and the order of the trial Court restored. It is open of course, to defendant 1 to claim maintenance from de-

fendant 6 who holds the family property now in the shape of cash instead of land. The appellants must pay the respondent's costs of the appeal and the costs of the respondent 1's cross-objections.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 220

MACLEOD, C. J. AND FAWCETT, J.

Ramkrishna Timmanna Bhat—Plaintiff—Appellant.

v.

Laxminarayan Narna Hegde—Defendant—Respondent.

Second Appeal 168 of 1919, Decided on 11th June 1920, from decision of Dist. Judge, Kanara, in Appeal No. 106 of 1918.

Hindu Law—Adoption—Lunatic.

Under the Hindu law an adoption by a wife to her husband, the husband being alive and a lunatic, is invalid. [P 220 C 2]

G. P. Murdeshwar—for Appellant.

S. V. Paleker and Nikant Atmaram—for Respondent.

Judgment.—The only question which has been argued in second appeal is whether an adoption by a wife to her husband, the husband being alive and a lunatic, is a good adoption. Now in this Presidency the wife cannot adopt to her husband while he is alive without his express consent. Such an adoption must necessarily be a very rare occurrence but where the consent of the husband is expressly required and the husband is a lunatic he cannot possibly give his consent. In this case it is suggested faintly that his mother could give consent on his behalf. But if we were to hold that the mother of a lunatic could give consent on his behalf to an adoption by his wife, then we should be making an addition to the Hindu law which we think we are not entitled to do. We think therefore that the learned District Judge was right and the appeal must be dismissed with costs. One set of costs.

G.P./R.K.

Appeal dismissed.

(1) [1894] 18 Bom. 452.

A. I. R. 1920 Bombay 221

SHAH AND HAYWARD, JJ.

Nasir Wazir—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 164 of 1919, Decided on 14th July 1919, from conviction and sentence passed by a Bench of Honourary Presidency Magistrates.

Prevention of Cruelty to Animals Act (11 of 1890), S. 3 (a) — Abandoning animal on street does not amount to ill-treatment.

An owner who abandons an animal, with the result that the animal is left to starve in the streets, is not guilty of an offence under S. 3 (a). Such abandonment does not amount to "ill-treatment" within the meaning of the section.

[P 221 C 2]

R. S. Pandit and *M. M. Kotasthane*—for Applicant.

S. S. Patkar—for the Crown.

Shah, J.—The accused in this case has been convicted by a Bench of Honourary Presidency Magistrates of ill-treating his horse on the 21st May last under S. 3, Cl. (a), Act 11 of 1890. His plea of guilty is recorded in these terms:

"I admit having turned my horse out to starve. It was on the road for twenty-five days."

The question in this application is whether the conviction under S. 3 (a) is right.

In substance what the accused did was that he abandoned his horse. After he turned his horse out, he apparently exercised no control over the animal and the horse was practically left uncared for in the public streets. The section provides among other things that

"if any person in any street or in any other place whether open or closed to which the public have access, or within sight of any person in any street or in any such other place cruelly and unnecessarily beats, overdrives, overloads or otherwise ill-treats any animal,"

he shall be liable to punishment by way of fine or imprisonment. All the acts of cruelty mentioned in this clause, viz., beating, overdriving and overloading suggest that the person concerned exercises an immediate control over the animal at the time. In the present case the accused is said to have ill-treated the horse by turning it out to starve.

It was suggested, on behalf of the accused in the course of the argument, that it would not be ill-treating the animal within the meaning of S. 3 (a) to let it starve. I am however not prepared to accept this argument. It may be that where the person is in a position to exer-

cise control over the animal and to prevent starvation, he may effectively ill-treat an animal by starving it.

But it seems to me that in the present case the accused ceased to exercise any control over the animal when he turned it out in the streets. In order that he can ill-treat his horse under S. 3 (a) it seems to me essential that in fact he must be in a position to exercise control over the animal at the time of the alleged ill-treatment. The statement of the accused is consistent with his having abandoned the animal altogether. The Act does not prohibit in terms a total abandonment of the animal by the owner; and the scheme of the Act does not suggest any such prohibition. It is apparently open to the owner under the Act to get rid of an animal, if so minded, by killing it or by abandoning it. It is clear from S. 5 that the Act does not prohibit the killing of an animal; it prohibits the killing of an animal in an unnecessarily cruel manner. There is no express provision relating to the abandonment of an animal by its owner.

It may be that in the case of animals thus abandoned by their owners in the city of Bombay the provisions of Ss. 52 and 53, Bombay City Police Act 4 of 1902, may afford some remedy. For under those provisions it is the duty of every police officer and it is lawful for any other person to seize and to take to any public pound for confinement therein any cattle found straying in any street, and if the owner does not come forward to claim the animal, the procedure laid down in S. 53 can be followed. Outside the Presidency towns, the provisions of the Cattle Trespass Act may serve the purpose more or less to the same extent as the provisions of the City of Bombay Police Act just referred to. I do not suggest that the provisions relating to the impounding of cattle afford an adequate remedy for an evil arising in consequence of the abandonment of animals by their owners. But I feel clear that such an abandonment is not prohibited by the Prevention of Cruelty to Animals Act; and the starvation of the animal after it is abandoned is not any ill-treatment of the animal by a person who has ceased to exercise any control over it. In the present case there is nothing to show and it is not suggested in the argument before us, that the subsequent

conduct of the accused indicated any attempt or intention on his part to resume control over the horse after he turned it out on or about the 1st May. I do not think therefore that the conviction under S. 3 (a) can be sustained.

If the evil resulting from the animals being thus abandoned in the streets assumes any appreciable proportion, it would be a matter for the legislature to consider whether the Act should not be suitably amended.

I would therefore set aside the conviction and sentence and direct the fine if paid, to be refunded.

Hayward, J. — The accused Nasir Wazir is a hack victoria driver and some time in May last turned his horse out into the street where it was subsequently found wandering by an agent of the Society for the Prevention of Cruelty to Animals. He admitted at his trial that had turned the horse out to starve and on that plea he was found guilty under S. 3(a), Act 11 of 1890.

The accused's act in turning out his horse to starve in the streets of a large town would no doubt be ill-treatment, in the ordinary meaning of the term. But the question to be decided here is whether it is ill-treatment which has been made punishable by law. It has been argued that his act amounted to mere abandonment and at most to a passive ill-treatment, similar to that of the man who left an injured horse to die was held to have committed no offence in the case of *Everitt v. Davies* (1) in England. It has been urged that this passive ill-treatment is distinguishable from the wilful leaving of a horse standing without food in a cab in a street, which was held to have been an offence in the case of *Anderson v. Wood* (2) in Scotland. It has been argued, on the other hand that the abandonment of the horse to starve comes within the words "cruelly beats, overdrives overloads or otherwise ill-treats" in Cl. (a), as the words "has in his possession for sale any animal suffering pain by reason of starvation or other ill-treatment" occur in Cl. (c); and as the starvation here resulted in a street, which would be a public place within the meaning of S. 3, Act 11 of 1890.

It seems to me however that abandonment of a horse in this manner, however morally reprehensible, has not been made expressly punishable by law. Abandonment has not been forbidden and alone would not amount to ill-treatment. It is not akin to cruelly beating, overdriving or overloading, and could not without strain of language be brought within the connected words "otherwise ill-treats." It cannot moreover be said without loose speaking that an abandoned horse is starved by the man who was previously its owner, any more than it could strictly speaking be said that a dismissed workman was being starved by his former master. It might on the other hand, properly be said that a horse kept standing in a cab without food was being starved by its driver, just as it might truly be said that a workman who was being sweated was being starved by his employer. It has also to be noticed that starving a horse has not been made per se an offence. It is no offence under the enactment to starve a horse in a stable. It would at most be an offence to starve a horse on a cab stand when it might be punishable as ill-treatment in a public place under Cl. (a), or to offer it when suffering pain from starvation for sale in a street when it would be punishable as an offence in a public place under Cl. (b), S. 3 of the Act. It would also be an offence to use a horse which had become unfit to work through starvation under S. 6, and it might also be an offence to let an animal, disabled by starvation, die in a street or other public place under S. 7 of the Act. But it would, in my opinion, be an abuse of our authority to hold that abandonment of a horse was an offence because starvation might result, when no express provision has been made to that effect in the Act and when that Act—11 of 1890—has, as indicated, been strictly limited in its operation by the legislature. It should be observed that starvation ought not to result in the town of Bombay, if it were recognized practically that any person might and every police officer ought to take any horse found straying in any public place to be found under S. 52, Bombay City Police Act 4 of 1902. It must also be presumed that there were good reasons for the restrictions imposed in the operation of the law, which was to have force not merely in presidency

(1) [1878] 38 L. T. 860=26 W. R. 332.

(2) [1881] 9 Ct. of Sess=4th Series Just. Cas C=19 Sc L. R. 142.

towns but throughout the rural districts of India.

G.P./R.K.

Conviction set aside.

*A. I. R. 1920 Bombay 223

MACLEOD, C. J. AND HEATON, J.

Goba Nathu Barola—Plaintiff—Appellant.

v.

Sakharam Teju Patil — Defendant—Respondent.

Second Appeal No. 95 of 1919, Decided on 10th February 1920, from decision of Dist. Judge, Khandesh, in Appeal No. 403 of 1917.

* Civil P. C. (5 of 1908), S. 47—Decree-holder-auction purchaser—Resistance to possession by judgment-debtor and also by stranger—Suit for possession against both is not barred by S. 47.

Where a decree-holder auction-purchaser in trying to obtain possession of the property purchased by him is resisted not only by the judgment-debtor but also by a stranger who claims to have an interest in the property, his proper remedy is to bring a separate suit for possession both as against the judgment-debtor and as against the stranger. S. 47 is not a bar to the maintenance of such a suit. [P 223 C 2]

P. B. Shingne—for Appellant.

Macleod, C. J.—The plaintiff in execution of his decree purchased the suit property with leave of the Court. Not being able to get possession after his purchase, he brought this suit against defendant 1, his judgment-debtor and defendant 2 who claimed to have an interest in the property, but who did not fill the position of judgment-debtor with regard to the plaintiff. The trial Court dismissed the suit as against both defendants on the ground that the plaintiff was the representative of the decree-holder, and the suit was barred under S. 47, Civil P. C.

In appeal the decree of the trial Court dismissing the suit as against defendant 1 was upheld, but the decree as against defendant 2 was set aside and the suit was remanded for trial.

The plaintiff has appealed against that part of the decree which dismissed his suit against defendant 1. Defendant 1 has not appeared, and we have not had the advantage of hearing what he might say on the question before us. No doubt in the case of *Sadashiv v. Narayan Vithal* (1) it was held by a Bench of this Court that a decree-holder by becoming a

purchaser at a Court-sale did not cease to be a party to the suit within the meaning of S. 47, Civil P. C., and that therefore proceedings for delivery of possession of the property purchased by the decree-holder were proceedings in execution of the decree, and fell within the scope of S. 47, Civil P. C. Now, in this case if defendant 2 had been a party to the suit, the facts of the case would have brought the suit within that decision. Here we have another party claiming title to the property purchased who was not a party to the original suit, and that, I think distinguishes this case from *Sadashiv v. Narayan Vithal* (1). If the judgment of the lower appellate Court were to stand, it would follow that the plaintiff would have to proceed in execution proceedings against defendant 1 and file a suit against defendant 2. The execution proceedings against defendant 1 might result in his having to file another suit against defendant 1, if the matters in dispute between him and defendant 1 could not be decided except by means of a suit. That would be a very unfortunate result. For myself I feel inclined to doubt the decision in *Sadashiv v. Narayan Vithal* (1). I would prefer to follow the decision of the Full Bench of the Allahabad High Court in *Bhagwati v. Banwari Lal* (2). However that may be, in this case, I think I can come to the conclusion that although the plaintiff remains a party to the suit as against defendant 1 yet defendant 2 not being a party to the suit, the plaintiff's proper remedy in order to get possession of the property purchased at the Court sale would be by filing a suit against both defendants 1 and 2. By purchasing the property the plaintiff no doubt does not cease to be a party to the suit. But he fills quite a different capacity as auction-purchaser. It appears to me that it would be more correct to say that as auction purchaser he acquires a different set of rights which entitle him to come to the Court for protection by filing a suit, instead of proceeding in execution. I would therefore reverse the decree of the lower appellate Court in dismissing the suit against defendant 1 and direct that the suit against both defendants should be remanded for trial and adjudication on the merits. The appellant must have his costs of the appeal.

(1) [1911] 35 Bom. 452=11 I. O. 987.

(2) [1909] 31 All. 82=1 I. O. 416 (F. B.).

Heaton, J.—I concur. Whether the decision in *Sadashiv v. Narayan Vithal* (1) is correct or not (and I think it may need reconsideration), yet the case, as presented by the plaintiff here, is certainly not one which can be summarily dismissed on the ground that the suit will not lie. Whatever the true facts may be, the plaintiff is seeking to recover possession from two persons, defendant 1 and defendant 2 and the relief he asks for against defendant 2 he could not obtain by proceedings in execution. Therefore he is driven to bring a suit, and as my Lord the Chief Justice has pointed out, it would really be a legal absurdity to compel him for one matter, which ought to be disposed of as one case to take separate proceedings; first, proceedings in execution against defendant 1; and then a suit against defendant 2. However involved our law of procedure may be I feel quite certain that it was never intended to produce results of that kind.

G.P./B.K.

Decree reversed.

*** A. I. R. 1920 Bombay 224**

SHAH AND HAYWARD, JJ.

Chatur Nath—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 332 of 1919, Decided on 24th July 1919, against conviction and sentence passed by Sess. Judge, Ahmedabad.

* Penal Code (45 of 1860), Ss. 302, 304, 323 and 325—Accused not having intended or not knowing that death would be caused—No offence of murder held committed.

A woman who was holding a child in her arms intervened unexpectedly in a scuffle between the accused and her husband on a dark night. The accused aimed a blow at the husband with his stick, but it accidentally struck the child and caused his death:

Held: that the accused was guilty only of the offence of causing simple hurt, inasmuch as he could not have intended to cause or to have known that he was likely to cause either death or grievous hurt. [P 224 C 2]

R. J. Thakore—for Accused.

S. S. Patkar—for the Crown.

Shah, J.—In this case in spite of the argument to the contrary, we are satisfied that accused 2 did cause injury to the baby, which resulted in its death. There is clear evidence in the case that accused 2 dealt the blow and there is no reason to distrust the evidence which has been believed by the trial Judge and

the assessors. The question however as to what offence has been committed by the appellant is one of some difficulty. The learned Sessions Judge was of opinion that it was not likely that the blow would have caused the death of an adult, but it might well have caused grievous hurt. On that basis, he found that the accused 2 was guilty of causing grievous hurt. The circumstances under which this blow came to be inflicted are briefly these: The woman with the child in her hand intervened, apparently unexpectedly, in the course of a scuffle between accused 2 and his party on the one hand and her husband and his brother on the other hand.

It was about the middle of a dark night that this took place and the blow which was aimed by accused 2 at the husband of the woman, whom he intended to attack, fell unknowingly on the child. It is clear that the accused 2 had the intention of thereby causing hurt to a person, and therefore he would be guilty of causing simple hurt. The learned Judge has expressed his opinion, and I agree with him, that the blow could not have caused the death of an adult and such a blow could not be treated as evidencing any intention on the part of the accused to cause the death of the person against whom he aimed it. There is equal difficulty, in my opinion, in treating this as a case of grievous hurt. It is difficult under the circumstances of the case to hold that the accused intended to cause or knew himself to be likely to cause grievous hurt. There is no doubt that he had a stick in his hand. But we do not know anything about the size and nature of the stick. It is not established on the evidence that the stick with the iron rings produced in the case was the stick used on the occasion. Taking it to be an ordinary stick which accused 2 used at the time, there is a reasonable doubt in my mind as to whether under the circumstances he could be said to have intended to cause or to have known himself to be likely to cause grievous hurt. He did not know that he was hitting a baby and the nature of the blow, taken with reference to the person against whom it was aimed, cannot be taken to indicate the necessary intention or knowledge as to causing grievous hurt. The conviction under S. 325 does not appear to me to be justified. The proper

conviction under the circumstances would be under S. 323, I. P. C.

I would accordingly alter the conviction to one under S. 323, I. P. C., and reduce the sentence to rigorous imprisonment for one year.

Hayward, J.—I concur. The accused has not, in my opinion, been proved to have intended to cause or to have known that he was likely to cause grievous hurt. It is true that he went armed with a stick with others to assault his enemies in the middle of the night. But it has not been proved what was the nature of the stick which he took, and it cannot be presumed that it was a dangerous weapon in default of any evidence of serious injuries having been given to the men whom he went to assault. The only injury apparently was the injury to the child and that on the evidence was accidental. It was no doubt in the result grievous, but he could not properly be held in the circumstances guilty of voluntarily having caused that grievous hurt. He would therefore be liable to conviction under S. 323 and not under S. 325, I. P. C.

G.P./R.K.

Conviction altered.

A. I. R. 1920 Bombay 225

MACLEOD, C. J. AND HEATON, J.
Balubhai Hiralal—Appellant.

v.

Nanalal Bhagubhai—Respondent.

First Appeal No. 169 of 1917, Decided on 20th October 1919, from decision of First Class Sub-Judge, Surat, in Civil Suit No. 169 of 1914.

(a) Hindu Law — Marriage — Damages for breach of contract of marriage if for proper reasons are not claimable — But expenses of betrothal can be claimed.

Although under the Hindu law a person retracting from a contract of marriage is exempt from fine if there is good cause for the retraction, yet he must pay the expenses incurred in connexion with the betrothal. [P 225 C 2]

(b) Civil P. C. (5 of 1908), O. 22, R. 1 — Suit for recovery of damages for breach of contract of betrothal abates on plaintiff's death.

A suit for the recovery of damages for breach of a contract of betrothal abates upon the death of the plaintiff. [P 225 C 2]

G. N. Thakor—for Appellant.

Jayakar, H.V. Divatia and M.B. Dave—for Respondent.

Judgment. — The original plaintiffs, who were father and son, brought this suit to recover the sum of Rs. 21,000 odd

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as damages for breach of a contract of betrothal. In 1901, defendant 1, the brother of the proposed bride, betrothed his sister to plaintiff 2. Plaintiff 2 was then nine years old and the proposed bride was four years old. In the ordinary course the marriage would have taken place in eight or nine years, that is to say, about 1910 or 1911. But postponements were made of the marriage ceremony by the defendant, in the belief that these postponements were required by the health of the bridegroom. In December 1913, the betrothal was broken off. In April 1914, the bride Mangalagavri married defendant 2. During the pendency of the suit plaintiff 1 died, and during the pendency of the appeal plaintiff 2 died. The suit was dismissed by the learned Subordinate Judge with costs. He held that defendant 1 was justified in retracting the engagement, and that therefore he could not be liable in damages, nor was he liable for out of pocket expenses. It is quite clear that owing to the death of both the original plaintiffs there can be no claim now for damages. The only question is whether the representatives of the original plaintiffs as members of the family are entitled to recover the out of pocket expenses, which the plaintiffs said they incurred while the betrothal was in existence. The learned Judge at p. 8, line 63, says:

"As there was sufficient reason for retracting the engagement, the out of pocket expenses cannot be recovered from defendant 1 under Verse 26, S. 11, Ch. 2 of the Mitakshara."

But it appears to us that the learned Judge has misread that particular verse. Verses 26, 27 and 28 deal with the question of betrothals and what are the consequences of a breach. Verse 26 says:

"For detaining a damsel, after affiancing her, the offender should be fined, and should also make good the expenditure together with interest."

By verse 27:

"If there be good cause, he shall not be fined, since retraction is authorized in such a case. The damsel, though betrothed, may be withheld if a preferable suitor present himself."

Then by Verse 28:

"Whatever has been expended, on account of the espousals, by the [intended] bridegroom (or by his father, or guardian) for the gratification of his own or of the damsel's relations, must be paid in full, with interest, by the affiancer to the bridegroom."

It is quite clear therefore that though the offender shall not be fined if there is

good cause for the retraction, yet in any event by Verse 28 he must pay the expenses incurred by the bridegroom or his father during the betrothal.

Now in this case the plaintiffs have claimed Rs. 1,089 as out of pocket expenses in connexion with the betrothal. They endeavoured to prove payments of various items making up that sum, but the learned Judge was by no means satisfied that such payments had been made. He says:

"The sum of Rs. 1,089 is made up of a series of small items ranging over a number of years. The items were spent on food and small presents of cloth and cash. They include a sum of Rs. 4-6-6, the railway fare of Haribhai who went to Bombay from Surat on 7th February 1913 to talk to defendant 1. Mangalagowri swears that she did not visit the plaintiff's house on several occasions charged for. She was then in mourning. The accounts produced on behalf of the plaintiffs were not at all regularly kept in the ordinary course of business. There is no evidence to show that any ornaments or any durable cloths of value, clothes that have not been worn out long before suit, have been presented to the girl. The account seems to have been made up from memory."

Therefore the plaintiffs who had to prove their claim fell very far short of what was required of them, and it is impossible for us in first appeal to take an account, as, in the first place, we have not got the proper materials which the plaintiffs should have produced in the lower Court. Therefore, as Rs. 25 were at least admitted in the written statement as having been paid for clothes and as it is certainly probable that some small sums were paid from time to time during all these years of the betrothal, I asked the respondents' counsel whether they were not prepared to make an offer in order to prevent further trouble. Mr. Jayakar offered to pay Rs. 250 and I think the appellants' pleader was certainly right in accepting that offer, because if the case had gone on, it was probable they would not have gained more than Rs. 25 admitted in the written statement. Therefore there will be a decree for the plaintiffs for Rs. 250 and proportionate costs throughout. As regards the plaintiffs' claim to two items of Rs. 10,000 the appeal abates. The respondents will get their costs on these two items in the ordinary way as when an appeal abates and has not been decided on the merits.

G.P./R.K.

Decree accordingly.

A. I. R. 1920 Bombay 226

PRATT, J.

Secretary of State—Plaintiff.

v.

Mahomed Yusuf Ismail and others—Defendants.

Original Civil Suit No. 869 of 1918, Decided on 7th August 1919.

Registration Act (16 of 1908), Ss. 17 and 2 (7)—Agreement to lease when only creating present transfer of interest is compulsorily registrable and not otherwise.

Agreements to lease which are compulsorily registrable under the combined operation of S. 2, sub-S. (7), and S. 17, are those agreements which import a present demise or the creation of an immediate interest. [P 227 C 2]

In order to determine whether an agreement is compulsorily registrable, the intention of the parties as declared by the words of the instrument must govern the construction. [P 228 C 1]

An agreement between the parties that at a future time one of them shall become the tenant provided certain things are intermediately done by the landlord or his agent so as to put the premises into a certain state which the agreement describes, is not an agreement of demise but an agreement to demise at a future date on the performance of certain conditions and is not therefore required to be registered. [P 228 C 2]

Bahadurji and Campbell—for Plaintiff.

Setalvad and Desai—for Defendants.

Judgment.—This is a suit for specific performance of an agreement to lease. The facts are not in dispute. In December 1914 the Presidency Postmaster was looking for premises for a new post office and entered into negotiations with defendant 1 who was constructing a building called the Sutar Chawl. The Presidency Postmaster gave the defendant particulars as to the nature and extent of the accommodation required and the defendant made the following offer in a letter, dated the 1st February 1915:

"With reference to the Post Office Superintendent's interview with me, I have arranged with Messrs. Mistry and Bhedwar, Architects, to have an accommodation for a post office at Sutar Chawl measuring about 650 sq. yds. and shall let it to you on a lease for ten years on the following conditions:

"1. The rent for the place would be Rs. 175 per mensem.

"2. The counters and a shelf would be supplied by me.

"3. The electric installation to be made by me, but will be maintained thereafter by you.

"The place would be ready for occupation by the 1st April 1915."

The Presidency Postmaster then obtained the sanction of the Postmaster-General and replied as follows on the 13th of February 1915:

"In continuation of my letter J. Masjid/2 dated the 6th February 1915, I have the honour to say that the Postmaster-General, Bombay, has accepted the proposal. I shall, therefore be much obliged if you will kindly do the needful now with a view to enable me to move the present J. Masjid Post Office into your new building in the Sutar Chawl with effect from the 1st April 1915. The Postmaster-General has further desired me to insert the optional clause in the lease, i. e., giving the post office the option to renew the lease for another five years. Kindly acknowledge receipt of this letter."

To this defendant replied on the 16th of February 1915 as follows:

"With reference to your letter No. Juma Masjid/2, dated 13th instant, I am making the necessary arrangements."

The defendant proceeded to make what he called the necessary arrangements, that is, to adapt the premises for use as a post office; but by 1st April these arrangements were not complete. The counters were not varnished, the shelves were not put up, and the electric lights were not installed. Nevertheless the post office went into occupation on 1st April and the improvements were completed in the following month.

Mr. Murtree, the Presidency Postmaster, says that he did not tender a lease for execution on entry into possession as the improvements had not been completed. After they were completed he instructed a subordinate to do so. But the defendant made no reply and the matter was lost sight of. But the Post Office continued in possession and paid the stipulated monthly rental.

Subsequently the defendant 1 leased the same property to two rent farmers, defendants, 2 and 3 and they served the Post Office with a notice to quit; and this led to the institution of the present suit.

On these facts the questions that arise are those embodied in the first two issues:

Does the correspondence disclose a completed agreement?

If so, is it inadmissible in evidence for want of registration?

Now, I think it can hardly be disputed that there was a completed agreement. The defendant's letter of 1st February was an offer embodying all the terms of the proposed lease. It is true that the Presidency Postmaster's reply was not an unqualified acceptance but suggested a further condition of an option of renewal. It was in fact an acceptance with a counter-offer, which the defendant in turn accepted by his letter of 16th February. The acceptance was not

express, but it is clearly implied in the statement that the defendant was making the necessary arrangements, specially in view of his subsequent conduct in giving possession to the Post Office.

The next question is the more difficult one: whether these letters embodying the agreement to lease are inadmissible in evidence in view of S. 49, Registration Act. That section enacts that no document which is required by S. 17 to be registered shall when unregistered be received as evidence of any transaction affecting property comprised therein. There can be no doubt that an agreement may be a transaction affecting property although it does not create an interest in the property. I think it is clear from the terms of S. 91, Trusts Act, where the same words "affecting property" are used.

The question then resolves itself to this: Whether the registration of this correspondence embodying the agreement to lease is compulsory under S. 17. Now the period is more than one year, and if the agreement be equivalent to a lease, registration will be compulsory under S. 17, sub-S. (1), Cl. (d). The Advocate-General for the plaintiff refers to the case of *Panchanan Basu v. Chandi Charan Misra* (1), where Jenkins, C. J., described an agreement to lease as falling under Cl. (h), S. 17, Act 3 of 1877, corresponding with S. 17 (2) (v) of the present Act (16 of 1908). But, I think, it is clear that this reference was an oversight, for that sub-section does not apply to leases and applies only to instruments described in S. 17, sub-S. (1), Cls. (b) and (c). The substantial reason given in the judgment was that in the document there considered no immediate interest was created and there was no present demise. This accords with the rule deducible from *Purmananddas Jiwandas v. Dharsey Virji* (2) and the recent judgment of this Court in *Kessowji v. Bai Kesarbai* (Appeal No. 2 of 1909) that agreements to lease which are compulsorily registrable under the combined operation of S. 2, sub-S. (7), and S. 17, Registration Act, are those agreements which import a present demise or the creation of an immediate interest.

Does this agreement import such a demise? Under the authorities

(1) [1910] 87 Cal. 808=6 I. C. 443.

(2) [1886] 10 Bom. 101.

"the intention of the parties, as declared by the words of the instrument, must govern the construction: *Poole v. Bentley* (3) and "where there is any doubt as to the operation of the contract, the Court must endeavour to discover the intention of the parties from the contents of the instrument, and if we see a paramount intention that the instrument shall operate as a lease we must hold it to be such, although it may contain conflicting expressions: *Pinero v. Judson* (4)."

Now, there are no words of present demise in the correspondence. "I let" or "I agree to let" have been held to be words of present demise, but here the words are "shall let." Again, as to the intention of the parties, the terms of the agreement and the collateral circumstances negative a present demise. The defendant offers to provide accommodation for a post office and to make the necessary improvements, and the plaintiff accepts subject to a counter-offer which is itself accepted. The making of the improvements was a condition precedent to the acceptance of the tenure and there can be no doubt but that the plaintiff could have refused to enter into possession on 1st April if counters had not been constructed. The parties therefore could not have intended the agreement to operate as a present demise. And the fact that the plaintiff waived the previous construction of some of the improvements and did enter into possession on the faith of the defendant's promise to complete does not affect this conclusion.

For the defendant it is contended that the fact of plaintiff entering into possession and paying rent is conclusive that there was a demise. No doubt there has been a demise, but how? Not under the agreement which was executory, but by implication from the fact that the defendant put the plaintiff into possession. When that was done on 1st April the agreement became executed and there was a demise. Nevertheless, on 16th February the agreement was still executory and imported no present demise. To quote the words of Baron Alderson in *Gore v. Lloyd* (5):

"Looking at the whole of this instrument, it appears to me that it was not intended to

give an immediate right to the party to be from that moment, and before the execution of any lease, a tenant from a future day, but that the true construction of the instrument is an agreement between the parties that at a future time one of them shall become the tenant, provided certain things are intermediately done by the landlord or his agent, so as to put the premises into a certain state, which the agreement describes. Then, it being shown that this agreement has been performed, and that the tenant is occupying the land, the terms of the agreement, coupled with his occupation, make him a tenant upon the conditions specified as the terms of the future lease."

That is exactly the case here. It is not an agreement of demise, but an agreement to demise, at a future date on the performance of certain conditions.

In *Regnart v. Porter* (6) an agreement containing prospective stipulations by the landlord to lay out money on the premises was held not to operate as a demise in praesenti. There were similar stipulations in *Staniforth v. Fox* (7), but they were held to be merely accessory in view of the express words "does this day agree to let," and the simultaneous payment of part of the rent. The recent case of *Inland Revenue Commissioners v. Earl of Derby* (8) illustrates the converse case of conditions to be performed by the tenant. There was an agreement to lease for a term commencing from Lady Day 1910. The agreement was concluded by correspondence of 5th April 1910 subject to certain conditions to be performed by the lessee, and the Court held that this was not the case of a tenancy actually created by agreement but an agreement which provides the conditions on which a lease can be demanded.

Sir Chimanlal for the defendant refers to *Barry v. Nugent* (9) and *Doe'd Walker v. Groves* (10) for the proposition that an agreement may operate as a present demise, although the execution in the future of a formal document was contemplated. No doubt, that will be so, if such can be collected to have been the intention of the parties. But that is not the case here and the extreme informality of the agreement concluded by the

(6) [1831] 7 Bing. 451=5 M. & P. 370=9 L. J. (o. s.) C. P. 168=131 E. R. 174=33 R. R. 537.

(7) [1831] 7 Bing. 590=5 M. & P. 589=9 L. J. (o. s.) C. P. 175=131 E. R. 228=33 R. R. 420.

(8) [1914] 3 K. B. 1186=84 L. J. K. B. 248=109 L. T. 827.

(9) [1782] 3 Dougl. 179=5 Term. Rep. 165n=99 E. R. 601.

(10) [1812] 15 East 244=104 E. R. 837.

(3) [1810] 12 East 168=2 Camp. 286=104 R. 66.

(4) [1829] 6 Bing. 206=3 M. & P. 497=8 L. (o. s.) C. P. 19=31 R. R. 388=130 E. R. 1259.

(5) [1844] 12 M. & W. 463=13 L. J. Ex. 366=152 E. R. 1279=67 R. R. 402.

correspondence supports the contention that there was no intention to make a present demise.

The agreement is therefore not barred by S. 49, Registration Act.

It is further contended on behalf of the plaintiff that the Crown is not bound by the Registration Act. But, in view of my finding on the construction of the agreement, I need not enter into a detailed discussion of this question and shall content myself with referring to S. 17, sub-S. (2), Cl. (vi), and S. 90 as containing an implication which takes away the prerogative of the Crown.

It is not contended that the delay in filing the suit disentitles the plaintiff to specific performance. The delay in this case leads to no inference of acquiescence, for the plaintiff was in possession. Nor has anything occurred in the interval which would make the grant of the relief claimed inequitable. On the other hand the equities are in favour of the plaintiff, for there has been part performance and the plaintiff has been put into possession.

The defendants 2 and 3 are subsequent lessees with notice, for plaintiff's possession was notice. They can therefore be made to join in the execution of the lease under S. 27 (b), Specific Relief Act.

The agreement is not stamped, but is nevertheless admissible in evidence in view of the exemption of Government contained in the proviso to S. 3, Stamp Act.

The following issues were framed :

(1) Whether there was a concluded agreement in correspondence between plaintiff and defendant 1 as alleged in para. 2 of the plaint ?

(2) Whether, if the issue 1 is found in the affirmative, the correspondence is admissible in evidence as the agreement to lease being not registered and not stamped ?

(3) Whether the plaintiff is not merely a monthly tenant ?

(4) Whether the plaintiff is entitled to specific performance of the alleged agreement ?

(5) Whether the plaintiff is entitled to an option of renewal for a further period of five years ?

My findings thereon are : (1) in the affirmative ; (2) in the negative ; (3) in the negative ; (4) in the affirmative ; (5) in the affirmative.

There will therefore be a decree in terms of prayer (a) to the plaint against defendant 1. Defendants 2 and 3 ordered to join in the execution of the said lease. The plaintiff to recover his costs from defendant 1.

G.P./R.K.

Suit decreed.

A. I. R. 1920 Bombay 229

MACLEOD, C. J. AND FAWCETT, J.

Pandu Krishna Jadhav — Plaintiff — Appellant.

v.

Dhondi Krishna Patil — Defendant — Respondent.

Second Appeal No. 34 of 1920, Decided on 22nd July 1920, from decision of First Class Sub-Judge, Satara, in Appeal No. 363 of 1918.

(a) **Hindu Law—Adoption—Widow of co-parcener cannot adopt without husband's authority or reversioner's consent.**

The widow of a co-parcener cannot adopt unless she has either the express authority of her husband or the consent of her husband's co-parceners. [P 230 C 1]

(b) **Hindu Law—Adoption—Adoption cannot be partly valid and partly invalid—Adopted son if not entitled to joint family property cannot also succeed to self-acquired property.**

An adoption cannot be partly valid and partly invalid, so that the person adopted, although excluded from becoming a member of the joint family, may still be entitled to inherit the self-acquired property of his adoptive father.

[P 230 C 1]

Nilkant Atmaram—for Appellant.

J. R. Gharpure—for Respondent.

Judgment.—The plaintiff filed this suit to recover possession of the suit property, alleging that it originally belonged to his father, Krishna, who had secured it under a gift deed from his maternal grandfather Rama. Krishna died in 1907 leaving a widow, Chandra, who disposed of the property in question to defendant 1 at the time when she was a minor. Defendant 2 is the father of Krishna who is joined as a co-defendant for some reason which is not very apparent. He claimed that Krishna died joint with him and therefore the adoption by Chandra was not valid. The first Court found that Krishna died separate from his father, defendant 2, but on grounds which do not appeal to us as being correct. The presumption is that Krishna was joint with his father. There is nothing to show that he ever became separate; admittedly, there was some property belonging to defendant 2 though its value may have been very small. The trial Judge came to the conclusion that because Krishna lived at Khed, where his grandfather lived and not where his own father lived, he had relinquished his right to any share of his father's property. However that may be that would not amount in law to a

separation. I think the learned appellate Judge was right in holding that Krishna and his father died joint although no doubt the property which was gifted to Krishna was his self-acquired property. Then the ordinary rule of Hindu law must apply, that the widow of a coparcener cannot adopt unless she has either the express authority of her husband or the consent of her husband's coparceners. An adoption cannot be partly valid and partly invalid, so that the person adopted, although excluded from becoming a member of the joint family, may still be entitled to inherit the self-acquired property of his adoptive father. In this case it seems obvious that the widow adopted the plaintiff in 1915 in order that he might make a claim to the property which had been alienated by her at the time she was a minor. She took, when her husband died, a life-interest in her husband's self-acquired property. No doubt, to that extent her alienation will be good, unless she is able to upset it on the ground that she was not competent to alienate at the time. But it is quite clear that the plaintiff cannot set aside the alienation on the ground that he is an adopted son. The judgment of the lower Court therefore must be upheld and the appeal dismissed with costs.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1920 Bombay 230**

MARTEN, J.

In the matter of the Trustees Act, 1866.
Basil Lang—Applicant.

v.

Moolji Karsonji and others—Opposite Parties.

Original Civil Suit No. 653 of 1897,
Decided on 12th August 1919.

(a) **Trustees Act (27 of 1866), Ss. 3, 6, 35 and 40**—High Court can appoint new trustee in case of Hindu charitable trust.

The High Court has power, under S. 35, read with S. 6 of the Act, in the case of a Hindu charitable trust to appoint a new trustee in place of one who has become incapable of acting in the trust. [P 231 C 1]

(b) **Bombay High Court Rules, R. 75 (z)**—Application for appointment of new trustee must be made by petition or summons.

Applications for the appointment of new trustees should normally be made by petition or summons to be heard in Chambers and the particular Act and section relied on must be specified in the application. [P 230 C 2, P 231 C 1]

Mirza—for Applicant.

Judgment.—This is a new motion for the appointment of a new trustee in the place of a trustee who is alleged to be of unsound mind. The applicant is his co-trustee.

The trust is an old charitable trust of a public or religious nature created by the will of a Hindu lady who died in 1873. This suit was begun in the year 1897, and by orders or decrees of 29th July 1898 and 11th April 1899 the validity of the trust was established; new trustees were appointed; the charity funds were lodged with the Accountant General to the account of this suit, and the income was directed to be paid to the new trustees.

In course of time there have been certain changes of trustees, and for that purpose the parties have adopted a course which seems to me unnecessarily expensive, viz., of applying by motion in Court for the appointment of new trustees. It was said that this course was adopted, because liberty to apply was reserved. I do not find in the orders that any such liberty was in fact reserved to the applicant. Even if there was such liberty, it does not mean that you are obliged to apply in open Court. It means liberty to apply in accordance with the ordinary practice of the Court. S. 40, Trustees Act, 1866, expressly authorizes a petition; and R. 75 (z) of the Bombay High Court Rules provides for such a petition being heard in Chambers. I think therefore that applications for the appointment of new trustees should normally be made by petition or summons to be heard in Chambers. There is all the more reason for doing that in the present case, as the matter concerns the personal incapacity of one of the trustees and such matters are, I think, more properly dealt with in Chambers.

It is no doubt true, as the applicant points out, that on two previous occasions in this suit, the appointment has been made by motion in Court. It would not therefore be fair on the present application to penalize the applicant for following these precedents. If however in future a further appointment should be necessary, then, if the application be once more made by motion instead of in Chambers, it will, I think be a matter for the Judge hearing the application to consider whether the appli-

cant should not be disallowed any extra costs thereby caused.

Turning next to the motion itself, counsel first contended that S. 92, Civil P. C., gave me the necessary jurisdiction. In my opinion it does nothing of the sort. This suit of 1897 cannot be turned twenty-two years afterwards into a suit for the removal of a trustee, who was not even appointed till 1913. Nor is there any consent in writing of the Advocate-General thereto.

The matter is far simpler than that. It is an ordinary application for the appointment of a new trustee in the place of a trustee who is no longer capable of acting in the trusts. I however wished to be told under what particular section of the Trustees Act, or otherwise, this application was being made. Care is, I think required over appointments of new trustees and vesting orders, and I think it would be a wise precaution if it were made obligatory to specify in the application itself the particular Act and section which are relied on, as indeed is the practice in England at any rate as regards vesting orders: see *Moss's Trusts, In re* (1) and R. S. C. O. 54 (b), R. 4-A. I was not however given the necessary information, and in consequence there have been at least two adjournments for that purpose. S. 6, Trustees Act, 1866 was next relied on, but that applies to vesting orders; and in the present case a vesting order is not required nor indeed is it asked for in the notice of motion.

Today I have been referred to S. 35, Trustees Act, 1866, which gives power to the Court to appoint a new trustee in all cases in which it shall be expedient to appoint a new trustee or new trustees, and it

"shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court."

This may be read with S. 6 which gives an express power to make a vesting order in the case of a lunatic trustee.

Prima facie therefore S. 35 would appear to give the Court the necessary jurisdiction. Counsel was unable to refer me to any Indian authority on the point, but I think the careful judgment of West, J. in *Kahandas Narrandas, In the matter of the petition of* (2) has a dis-

tinct bearing on the present case. It disposes, for one thing, of a possible objection that having regard to S. 3, the Trustees Act 1866, does not apply to a Hindu charitable trust such as I have to deal with. There as here the application was for the appointment of a new trustee of a Hindu charitable trust. It was objected that the Court had no jurisdiction on petition as opposed to a suit, as the case was not one to which English law was applicable within the meaning of S. 3: (see p. 170). That objection the learned Judge overruled. Further, I think it reasonably clear that he would have appointed a new trustee under S. 35, but for the fact that the trust instrument contained an express power for the respondent (the surviving trustee) to appoint a new trustee with the consent of the petitioner (settlor), and that the respondent was willing to exercise such power. The petition was accordingly directed to be dismissed. It would however appear from the foot-note to the report that the parties subsequently agreed to the Advocate-General nominating a new trustee, and that such nomination was embodied in the order eventually made.

The English authorities are only useful by analogy; but the analogy is rather close. S. 35, Trustees Act, 1866, is practically the same as S. 32, English Trustees Act, 1850, and S. 25, English Trustee Act, 1893. In *M., In re* (3) Stirling, J., held that under the Acts of 1850 and 1852 and in cases where no vesting order was required, the Court of Chancery had power to appoint a new trustee in the place of one who had become a lunatic [see p. 83] and that the Chancery Division had still that power under the 1893 Act. As regards vesting orders, the law was different, but that depended partly on a consideration of the English Lunacy Acts; and since the above decision, the Lunacy Act, 1911, has restored or given to the Chancery Division the necessary jurisdiction in several cases. The case does not therefore apply to India as regards vesting orders. But as regards the appointment of new trustees, it is useful as a decision in support of the jurisdiction under legislation very similar to the Indian legislation.

(1) [1888] 37 Ch. D. 518=57 L. J. Ch. 423=58 L. T. 468=36 W. R. 816

(2) [1880-81] 5 Bom. 154.

(3) [1899] 1 Ch. D. 79=63 L. J. Ch. 86=79 L. T. 459=47 W. R. 267=15 T. L. R. 54

Weston's Trusts, In re (4) is a decision by the same Judge to the same effect. There however the trustee was suffering from heart disease, old age (eighty) and consequent impairment of mental faculties. The incapacity to act arose therefore from physical and not from mental infirmity.

Under the above circumstances, I am of opinion that I have jurisdiction under the Trustees Act, 1866, to appoint a new trustee in the present case. I need not therefore consider whether I have any general jurisdiction apart from that Act.

On the facts I am satisfied that Harilal Narbheram, owing to his mental condition is no longer capable of acting in the trusts, and that another trustee should be appointed in substitution for him. I think it unnecessary to direct any inquiry under S. 50 as to his state of mind, or to direct the medical evidence to be on oath and brought up to date. I think I may properly save the charity that expense; but I hope that the medical certificate accepted in the present case will not be adopted as a precedent in any other case. Nor have I thought it essential in the present case to have the application served on Harilal Narbheram: see *Memorandum as to Practice* (5). I think however that the title of the application should be amended by being made in the matter of the Trustees Act, 1866, in addition to the existing title.

In the result there will be an order appointing Mr. Amratlal Bhagwani to be a trustee in substitution for Mr. Harilal Narbheram. The order should state in effect that Mr. Harilal is unable owing to his infirmity of mind to act further in the trusts. The order will then go on to appoint Mr. Amratlal Bhagwani to be a trustee in substitution for him, and to act jointly with the continuing trustee, Mr. Bhagwan Rewashankar (the applicant). Then there will be an order directing the Accountant-General to pay all arrears of income and future income to the new trustees until further order.

The costs are to come out of the estate, except that the costs of hearing are to be confined to the costs of one day's hearing only. Draft order to be shown to me before it is passed and entered.

G.P./R.K.

Order accordingly.

(4) [1898] W. N. 151.

(5) [1901] W. N. 85.

* A. I. R. 1920 Bombay 232

MACLEOD, C. J. AND FAWCETT, J.
Chokhu Raoji Mahar and others —
Plaintiffs—Appellants.

v.

Tatya Nama Mahar and others —
Defendants—Respondents.

Second Appeal No. 929 of 1919, Decided on 2nd July 1920, from decision of Assistant Judge, Sholapur, in Appeal No. 125 of 1918.

* **Hindu Law—Joint family—Self-acquired property—Family property sold in revenue sale and purchased by member becomes ordinarily his self-acquired property.**

Where joint family property is put up for sale by the revenue authorities on account of arrears of revenue and is purchased by one of the members of the family, then, unless it can be shown that it was purchased out of the joint family purse or was thrown back into the joint family property, it becomes the private property of the purchaser. [P 233 C 1]

P. V. Kane—for Appellants.

K. H. Kelkar—for Respondents.

Macleod, C. J.—The plaintiffs sued for partition and possession of their half-share in the plaint property. The learned Assistant Judge reversed the decree of the lower Court in favour of the plaintiffs and dismissed the plaintiffs' suit with costs. The learned Judge said :

"The only issue in appeal was, whether the property was joint property of Nama, Vithoba and Raoji, the ancestor of the plaintiffs."

He came to the conclusion that it was not. That, as far as we are concerned, is a finding of fact. But an entirely new point of law has been raised in second appeal, namely, that assuming that the property had been joint and then lost on account of its being sold for arrears of revenue, but afterwards recovered by one of the members of the family, other than Raoji, out of his own means, then the text of the Mitakshara applies, which says that, when family property has been lost and then re-acquired by one of the members of the family, that member is entitled to keep a quarter to himself, while the remaining three-quarters must go back into the family. That text and others were discussed in *Bajaba Bajirao v. Trimbak Vishvanath* (1). There the learned Judges say :

"Though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means to enjoy it, as in the case of another acquisition, free from claims to partition by his co-parceners, yet neither is any express limit set to such enjoyment, and it would pro-

(1) [1910] 34 Bom. 106=4 I. C. 255.

bably now be held that such property stands on the same footing as any other purchased property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo Pershad Roy v. Debee Pershad Tewaree* (2)."

Then the judgment refers to the case of *Visalatchi Ammal v. Annasamy Sastry* (3) which said :

"The language both of the texts and the commentaries seems to us as at present to indicate that the rule was intended to apply strictly to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time: 'property unjustly detained which could not be recovered before' is the import of the ordinance of Manu, Chap. 9, Sloka 209."

This is not a case of a family being violently or wrongfully dispossessed or adversely kept out of possession of the suit property. What happened was that, it was put up for sale by the revenue authorities on account of arrears of revenue and was purchased by one of the members of the family. Therefore unless it can be shown that it was purchased out of the joint family purse or was thrown back into the joint family property, it became the private property of the purchaser. The judgment of the Court below must be confirmed and the appeal dismissed with costs.

G.P./R.K.

Decree confirmed.

(2) [1866] C W. R. 53.

(3) [1869-70] 5 M. H. C. R. 150.

A. I. R. 1920 Bombay 233

MACLEOD, C. J. AND HEATON, J.

Chintamani Hargovan and others—
Plaintiffs—Appellants.

v.

*Ratanji Bhimbhai and others—*Defendants—Respondents.

Second Appeal No. 456 of 1919, Decided on 3rd March 1920, from decision of Asst. Judge, Surat, in Appeal No. 89 of 1918.

Easements Act (5 of 1882), S. 28—Extent and mode of enjoyment of easement is fixed by intention of parties—In absence of evidence right of way for persons, carts etc., cannot be used as right of way for sweeper.

Under S. 28 the extent of any easement, (other than an easement of necessity), and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired. In the absence of evidence as to such intention and purpose, a right of way of any one kind does not include a right of way of any other kind.

A right of way for persons, cattle, carts, etc., does not include a right of way for sweepers removing night-soil.

[P 233 C 2]

G. N. Thakor—for Appellants.

M. H. Mehta—for Respondents.

Macleod, C. J.—The plaintiffs sued for an injunction against defendants 1 to 3 restraining them from using the way in question as a way for Bhangis, and other persons of an untouchable class, to clean the privy intended to be erected by them. The plaintiffs' claim has been rejected in both Courts. Defendants 1 to 3 are the owners of a house which is marked on the left side of the plan, and they instituted Suit No. 623 of 1912 against the present plaintiffs and defendant 4 to establish their right of passage for persons, cattle, carts, etc., over the open ground in front of the houses of the then defendant. The then plaintiffs' right of easement was held to be proved to a passage of six feet in width, and a decree was passed in their favour together with an injunction for the removal of the obstruction placed by the then defendant. At that time, the privy in the defendants' house was situated at the opposite end of their premises, and there was no suggestion during the proceedings in that suit, that the defendants had ever used the road, or the ground over which they claimed the right of way for the purpose of removing night-soil from their privy. They now wish to alter the position of the privy, and claim that they are entitled to a passage for the Municipal sweepers carrying night-soil from their privy over the passage which is referred to in the decree in Suit No. 623 of 1912.

Under S. 28, Easements Act, the extent of any easement (other than an easement of necessity), and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired. In the absence of evidence as to such intention and purpose, a right of way of any one kind does not include a right of way of any other kind. Therefore, when this right of way was fixed by the decree in Suit No. 623 of 1912, it is quite clear it was never intended by the Court to hold that the then plaintiffs had acquired a right of way over this ground for the Municipal sweepers removing night-soil from their privy.

Taking into consideration the conditions in this country, it seems to me that if a party is able to prove that he has used a certain way for himself and

his servants during the time required by the Easements Act, the Court, holding that he has a right of way, is bound to consider the evidence in the case, and decide in what way exactly the right of way claimed has been used.

We have been referred to the case of *Esubai v. Damodar Ishvardas* (1). That was a case where the plaintiff claimed an easement of necessity, and different considerations apply in the case of such an easement. Here there is no question of an easement of necessity. That would only arise supposing access to the defendants' property could only be obtained through the passage over the plaintiffs' land.

A very similar question arose in *Narayanacharya v. Ganu*, S. A. No. 255 of 1919, decided on 13th February 1920. The plaintiff there proved that he and his people had a right of passage over the plaintiff ground, and he sued to obtain a perpetual injunction restraining the defendants from obstructing his sweeper. But it was proved that the plaintiff had erected a privy within five years of the suit, and that before his right of passage over the plaintiff ground had been acquired the passage could never have been used by the sweepers carrying night-soil. It was held in the lower appellate Court that the right which the plaintiff had established did not include the right of passage for a sweeper carrying night-soil. That decree of the lower appellate Court was affirmed by us in second appeal.

In my opinion therefore it was never intended, when the Court passed the decree in Suit No. 623 of 1912, that the then plaintiffs should be held to have a right of passage over the way for their sweepers carrying night-soil because there was no evidence whatever that the then plaintiffs had used the passage for their sweepers, and if such a passage had been claimed, we cannot say what the Court would have decided. The decree in that suit upholding the then plaintiffs' claim to a right of way must be strictly construed according to the facts of the case, and to hold now that the right of way of the present defendants for themselves and their servants should be extended so as to include a right of passage for sweepers carrying night-soil would be going, in my opinion,

further than the decree intended. I think then that the appeal must be allowed and the plaintiffs' claim decreed with costs throughout.

Heaton, J.—Defendants 1 to 3 have acquired by the decree of a civil Court a very extensive right of way over certain property common to the plaintiffs and defendant 4. It is a right of way for the passage of persons, cattle, carts, etc., to the house of the defendants. Of course, it includes everything that is properly incidental to such a right of way. If for example the defendant at the time that his right of way was declared by the Court possessed only one cart and he afterwards came to possess two or three carts he would have the right of way for all those carts. If his family became larger in number, or his servants more numerous, he would have the right of way for the additional members of his family and the additional servants. All that is included in the fundamental idea of a right of way, and is properly incidental to it.

But when you come to what is the subject of contention in this appeal, and that is a right of way for Municipal sweepers carrying night-soil, you introduce a new element altogether. It certainly is not generally incidental to a right of way that a sweeper carrying night-soil should use it. Such a person is not one of the normal class of servants of a household in this country. Even in Municipal towns where there are privies and Municipal sweepers, even there the passage of a sweeper over a particular way is by no means a necessary feature of the general use of that way. There are ways over which these sweepers may pass: and there are other ways over which they do not pass. So that we have in a case like the present, to determine whether the right of way as declared did either expressly or impliedly include the right of Municipal sweepers to pass over the way. It certainly did not expressly include it. In order to say whether it impliedly included it, we have to examine the circumstances of the case at the time when the right of way was declared by the Court. At that time there was no privy in existence which sweepers would reach by using this particular way. There was a privy, but it stood elsewhere, and was approached by a different way altogether

(1) [1892] 16 Bom. 552.

and what the defendants have done is to remove the old privy, or at any rate establish a new one, which can only be served apparently if the sweepers are allowed to use this particular way. By so doing the defendants have introduced a new element into the matter which the established circumstances show was not, and could not have been, in the contemplation of the parties or of the Court at the time when the right of way was declared by the Court. I think therefore having regard to the circumstances which are established, that the appeal must be allowed and the claim decreed with costs throughout.

G.P./R.K. *Appeal allowed.*

A. I. R. 1920 Bombay 235

MACLEOD, C. J. AND HEATON, J.

Chhotubhai Govindji Desai—Plaintiff
—Appellant.

v.

Secy. of State—Defendant—Respondent.

First Appeal No. 44 of 1917, Decided on 21st October 1919, against decision of Dist. Judge, Surat, in Suit No. 9 of 1914.

Limitation Act (9 of 1908), Art. 14—Suit for possession of river bed leased out by Collector—Art. 14 applies—Time runs from order of Collector declining to grant claim under Bombay Land Revenue Code (5 of 1879), S. 37.

Article 14, Sch. 1, Limitation Act, operates to bar a suit to recover possession of lands forming a river bed leased by the Collector, unless brought within one year of the date of the Collector's order under S. 37, Bombay Land Revenue Code, declining to entertain such claim.

In computing the period of limitation for such a suit in a case where the Collector's order was passed before Bombay Act 11 of 1912 came into force, the terminus a quo is the date of that order. [P 235 C 3]

P. B. Shingne—for Appellants.

S. S. Patkar—for Respondent.

Macleod, C. J.—The plaintiff in this suit had been in possession of a piece of land measuring 1 acre and 21 gunthas on the bank of the Tapti river in the village of Katargam in the Surat District. He alleges that by reason of such occupancy he has by law and usage the right of access to the river and to the use of the water of the river, and has a right to the accretions by alluvion, and that defendant 1 in derogation of his rights has leased out the land in suit for five years to defendant 2, and that defendant 2 has put up a wire fence on or

about 24th May 1912, which prevented the plaintiff from exercising his rights, and has thus caused him a loss which he assessed at Rs. 100. The Collector's order is dated 16th July 1912, and purported to be made under S. 37, Bombay Land Revenue Code. It does not appear that the Collector had come to a conclusion that the land leased to defendant 2 was alluvial land within the meaning of S. 63, Bombay Land Revenue Code. Under that section:

"When it appears to the Collector that the occupancy of any alluvial land which vests, under any law for the time being in force, in Government, may with due regard to the interests of the public revenue, be disposed of in perpetuity, he shall offer the prior right of occupancy thereof to the occupant, if any, of the bank or share on which such alluvial land has formed."

That is how the section ran in 1912. It has since been altered by Act 4 of 1913. It is evident from the written statement that the Collector considered that the land in question was part of the river bed and was fit for cultivation when it was not covered by water, and that it had been let out from time to time as such land. It seems obvious therefore that any claim that the plaintiff as occupant of land on the river bank had under S. 63 to have alluvial land offered to him never arose, and he could have no cause of action against defendant 1 for letting out the land in the river bed to another party. But it is also clear that the plaintiff, if he had any cause of action, was bound to set aside the order of 16th July 1912, and under Art. 14, Limitation Act, he was bound to file that suit within one year. The order of 16th July 1912 was passed before Act 11 of 1912 came into force, and under S. 11, Bombay Revenue Jurisdiction Act, it is quite clear that time must be held, as was held in another case quite recently, to run from the date of the order by the Collector, and not from the date of the final order which was made by the Governor-in-Council on 16th June 1913. I think therefore that the appeal must be dismissed with costs.

Heaton, J.—I agree. It is quite plain from the plaint in this case that what the plaintiff complains of is the act or order, whichever it may be, of the Collector of 16th July 1912. If that act or order was correct the plaintiff has no cause of action. If it was not correct, yet it was

an act or order which requires to be set aside to enable the plaintiff to obtain relief. It was argued that it was ultra vires. But that argument has not been made good, and cannot be made good, on the record before us. Therefore the plaintiff only had 12 months from 16th July 1912 within which to bring his suit. Having failed to do that, his suit was rightly dismissed as being beyond time.

G.P./R.K.

Appeal dismissed.

* A. I. R. 1920 Bombay 236

MACLEOD, C. J. AND HEATON, J.

Ramnath Chhoturam and others —
Plaintiffs—Appellants.

v.

Goturam Radhakisan and others—De-
fendants—Respondents.

First Appeal No. 315 of 1916, Decided on 21st August 1919, from decision of Joint First Class Sub-Judge, Dhulia, in Suit No. 42 of 1909.

(a) **Hindu Law — Partition — Accounts—**
Manager is not bound to maintain accounts.

The manager of a joint family is not obliged to keep accounts while the family remains joint and when a partition is asked for, partition takes place of the property as it exists in the hands of the manager. [P 236 C 2, P 237 C 1]

*(b) **Hindu Law—Partition—Effect—Neces-**
sary expenses of family during partition can
be deducted from joint funds before division.

When a suit is filed for partition of joint family property, there is a severance of interest from the date of the filing of the suit, and for purposes of inheritance and succession the family members are no longer considered joint, but so far as the family property is concerned, the family is considered as one entity until the moment comes for division, and then each party gets his actual share. In the meantime, if there are any expenses which should be properly incurred by the joint family purse, those expenses are taken out of the family property and they cannot be debited to any particular co-parcener. [P 237 C 1]

Jayakar and P. B. Shingne—for Ap-
pellants.

G. S. Rao—for Respondents.

Macleod, C. J.—This was a partition suit filed in 1909. It is not disputed that the plaintiffs on the one hand are entitled to one-half of the joint properties, while the defendants are entitled to the other half. A preliminary decree was passed, and it was referred to a commissioner to take the accounts of the family property. On his report the defendants filed certain objections, and again it was referred to a second commissioner to consider the accounts in the light of defendants' objections and he took the accounts and made

up a final balance sheet. The result was as shown in the final decree of the learned Subordinate Judge at p. 3:

"The defendants shall pay to the plaintiffs Rs. 4,626-10-0 as mesne profits of the Nipani lands for the years 1905 to 1909. They shall also pay Rs. 2,878-8-0 and Rs. 704 and Rs. 257."

The plaintiffs appealed, and though it does not appear in their objections which they filed what their real objections were to the decree, yet now their counsel has objected on the ground that the learned Subordinate Judge has not dealt with certain items which were found by the first commissioner, and objected to by the defendants. In the first place, if it is a fact that the learned Judge omitted to deal with certain items in the account when he was dealing with the commissioner's report, that ought to have been pointed out to him by the defendants' pleader. Now five years after the final decree was passed, and without any particulars having been alleged regarding these objections, we are asked to send back the case to the learned Judge so that he may deal with these items, which we are told he has omitted to consider. We are not satisfied by any means that the learned Subordinate Judge omitted to deal with these points, or that they were not dealt with by the second commissioner. The second commissioner's report is extremely full, containing every detail of the family property, and at this distance of time it is very difficult for us to say with any degree of certainty that the accounts have not been fully gone into, that all the objections have not been dealt with, and that the learned Judge in dealing with the commissioners' reports has not fully gone into every item and decided the case after such consideration. We are not therefore disposed to accede to the appellants' suggestions, and so far the appeal must be dismissed with costs.

Now we have to deal with respondents' cross-objections. They object to the plaintiffs being held entitled to claim mesne profits for the years 1905 to 1909. I do not understand on what principle these mesne profits were allowed by the learned Subordinate Judge. As I have always understood the Hindu law on the point, the manager of a joint family is not obliged to keep accounts, while the family remains joint, and when a partition is asked for, partition takes place of

the property as it exists in the hands of the manager. It may be that the opponents may urge that the manager had in his possession family property and that he must account for its disappearance, and that was the case in a suit recently before me on the original side. But that was a different matter to asking the manager to account for the rents of the joint family lands, and I think Mr. Rao's contention is correct, and that the learned Judge was wrong in ordering that the plaintiffs should recover their shares of the mesne profits from the defendants.

Then Mr. Rao objected to the marriage expenses of plaintiff 1 being deducted out of the joint family purse. No doubt from the date of suit there is a severance of interest, and for purposes of inheritance and succession the family members are no longer considered joint. But it does not follow that thereafter until the joint family property is actually divided, it does remain joint. Otherwise this difficulty would arise: that immediately after the suit was filed, the person in charge of the family property would have to open a separate ledger account for each co-parcener, and would have to debit to his account all expenses made on his behalf. It would be necessary to do that if Mr. Rao's contention were correct. I have never heard of any such procedure being followed during the course of partition proceedings. As far as the joint family is concerned, it is considered as one entity until the moment comes for division, and then each party gets his actual share. In the meantime if there are any expenses which should be properly incurred by the joint family purse, those expenses are taken out of the family property, and they cannot be debited to any particular co-parcener. Therefore in my opinion the learned Judge was correct as regards those expenses.

Then it has been proved that Rupees 9,429.5-6 were recovered by the deputy nazir as guardian of the appellants under a promissory note of 16th October 1908. The defendants sued to recover their share by a separate suit which was resisted by the appellants successfully, but it was on account of that suit that this particular sum was left out of consideration when taking the account of the joint family property. It is perfectly clear that this is an asset of the joint family

property, and that the defendants were entitled to half that amount.

The result of this judgment will be that the item of Rs. 4,626-10-0, which was directed by the order of the lower Court to be paid by the defendants to the plaintiffs goes out, and defendants have to pay Rs. 3,839-8-0. Against that they will be entitled to recover half of Rs. 9,429-5-6, so that in the end there will be a balance due to them from the appellants. If anything has been paid by the defendants under the decree of the lower Court the appellants must restore that amount. We make no order as to the costs of the cross-objections.

Heaton, J.—I concur.

G.P./R.K.

Order accordingly.

A. I. R. 1920 Bombay 237

HEATON, AG. C. J. AND CRUMP, J.

Krishnabai Govind Joshi—Plaintiff—Appellant.

v.

Keshav Gajanan Potbhare—Defendant—Respondent.

First Appeal No. 61 of 1919, Decided on 7th April 1920, from decision of First Class Sub-Judge, Poona, in Civil Suit No. 556 of 1917.

Hindu Law—Succession—Female heirs—Succession by, is not general rule but exception—Paternal uncle's daughter is not gotraja sapinda.

As a general rule the Hindu law is opposed to succession of females and such female heirs as have been recognized as entitled to inherit come in as exceptions to the general rule.

A paternal uncle's daughter is not a gotraja sapinda. [P 237 C 2, P 238 C 1]

M. V. Bhat—for Appellant.

M. V. Joshi—for Respondent.

Crump, J.—The only question which arises for our decision in this case is whether an uncle's daughter is or is not gotraja sapinda. Mr. Bhat for the appellant has sought to argue from a case of a sister that this question should be answered in the affirmative. It is almost sufficient to point out that Mr. Bhat has been forced to admit that the logical conclusion of his line of reasoning would be that all females must necessarily be counted as gotraja sapindas. We think that this would be contrary to the fundamental principles of the Hindu law as hitherto interpreted by our Court. The lower Court has correctly stated that, as a general rule, the Hindu law is opposed to succession of females and that such female heirs as have been recog-

nized as entitled to inherit come in as exceptions to this general rule. It is, therefore, unsound to attempt to extend these exceptions by arguing that there is any principle involved in those cases where such exceptions are permitted. The special case of a sister can only be justified on the grounds which are special to herself as has been repeatedly decided in the decisions of this Court. We are not prepared to argue from the case of a sister to that of more distant relations, and to thereby extend the list of female heirs further than has already been done in this presidency. It is admitted that there is no decision which is directly in point on this question, and such passages as have been cited to us from other decisions do not, we think, bear out the line of argument which is sought to be based upon them. In those cases the position of a sister is in question, and as is well known every case is only an authority upon its own facts. We think that the attempt to extend the list to an uncle's daughter must necessarily fail and we therefore dismiss the appeal with costs.

Plaintiff to pay costs of the respondents and the court-fees which would have been paid if she had not been allowed to appeal in forma pauperis.

Heaton, Ag. C. J.—I concur.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1920 Bombay 238

MACLEOD, C. J. AND HEATON, J.

Malappa Bharmappa and others—Appellants.

v.

Hanmappa Mardeppa and others—Respondents.

Second Appeal No. 565 of 1917, Decided on 21st October 1919, from decision of Dist. Judge, Dharwar, in Appeal No. 141 of 1915.

Hindu law—Adoption—Widow—Power—Widow succeeding as mother to her minor son can adopt to her husband—Husband's death as joint and son subsequently separated and not obtaining reversioner's consent are immaterial.

A Hindu widow succeeding as heir to her son who dies unmarried is entitled to adopt to her husband, provided that her son had not attained ceremonial competence. In such a case it makes no difference that the husband of the adopting widow died in union with his co-parceners and that her son separated subsequently and that the consent of the co-parceners was not obtained.

[P 238 C 2, P 239 C 1]

H. B. Gumaste—for Appellants.

A. G. Desai—for Respondents.

Macleod, C. J.—The plaintiffs sued for possession of a house and a one-fifth share of the lands as described in para. 1 of the plaint with mesne profits.

The first plaintiff is the adopted son of plaintiff 2, who is the widow of one Bharmappa. Bharmappa admittedly died in union with his brothers, defendants 1 to 3 and the husband of defendant 4, leaving a minor son Mahadevappa. Thereafter there was a partition between Mahadevappa and his uncles. He died unmarried in 1907, leaving his mother defendant 2 as his heir. In 1908 she demanded her share which the defendants refused in 1908, since when they have been in possession against her. In 1909 she adopted plaintiff 1.

Defendants 2 and 3 in their written statement contended inter alia that the adoption was invalid, and this is the only question which has been argued before us in second appeal. The trial Court decided in plaintiff's favour. The lower Appellate Court however modified the decree of the trial Court, holding that the adoption was invalid and awarded possession to plaintiff 2 only. It must be considered now as settled law that a widow succeeding as heir to her son who dies unmarried is entitled to adopt to her husband, provided that her son has not attained ceremonial competence *Verubhai Ajubhai v. Bai Hiraba* (1).

The principle of such recognition is that the act of adoption is derogatory of no other vested right than those of the adopting mother: see *Rajah Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narsayya* (2), *Gavdappa v. Girmallappa* (3) and *Payapa v. Appanna* (4). But it has been contended that because Bharmappa died in union, and thereafter his widow could not adopt without the consent of his co-parceners, her right to adopt came to an end at the separation and could not be revived. No authority which is really in point has been cited for such a proposition. Reliance was placed on the decision in *Ramkrishna v. Shamrao* (5), but what was decided in that case was that when the inheritance

(1) [1903] 27 Bom. 492=30 I.A. 234=5 Bom. L. R. 534=7 C. W. N. 716=8 Sar. 508 (F.C.).

(2) [1876-78] 1 Mad. 174=4 I.A. 1=26 W.R. 21=3 Sar. 669=3 Suth. 353 (P.O.).

(3) [1895] 19 Bom. 331.

(4) [1899] 23 Bom. 327.

(5) [1902] 26 Bom. 526=4 Bom. L. R. 315.

of the son has vested in some other heir than the mother herself, her power of adoption comes to an end and cannot be revived. Nor is the case of *Datto Govind v. Pandurang Vinayak* (6) of any assistance to us. There A and S were two joint brothers. S died leaving a widow, who on A's death succeeded to the estate. She adopted a son to her husband and the reversioners objected. The question whether a widow, who succeeds to an estate not her husband's but as Gotraja Sapinda of the last male holder, in consequence of the absence of nearer heirs such as the mother and grandmother, could make a valid adoption, was answered in the negative.

That is not the question before us in this case, which, as far as I can gather, has never arisen before, and must be decided on general principles. In this Presidency no express authorization by the husband to the widow to adopt is necessary. Only if he is a member of a joint family the consent of the co-parceners is necessary. In this case there could be no talk of adoption as long as Mahadevappa was alive, but it is not correct to say that the power to adopt must be in the widow at the time of her husband's death, and if it is not that it cannot arise afterwards. If Bharmappa had died separate the power to adopt remained suspended, at any rate as long as Mahadevappa did not marry or attain ceremonial competence. Until the separation her power still remained suspended and if Mahadevappa had died in union, she could have adopted with the consent of defendants 1 and 3. I see no reason therefore why after the separation the power of adoption did not remain suspended, the only change being that if events happened which enabled it to be exercised, there were no longer any co-parceners whose consent was necessary. The rights of reversioners are not vested, so that her adoption of plaintiff 1 was not derogatory of any vested right. That, and the condition that the son's estate has not vested first in some one other than herself, are the only two conditions which, in my opinion, stand in the way of the widow's right to adopt even if her husband died in union.

Therefore the appeal must be allowed and the decree of the trial Court restored with proportionate costs on defendants 2

(6) [1908] 82 Bom. 499=10 Bom. L. R. 692.

and 3 throughout, except that only Rs. 400 are allowed as mesne profits.

Heaton, J.—I agree.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 239

MACLEOD, C. J. AND HEATON, J.

Ranchangauda Irangauda Patil—Appellant.

v.

Secretary of State—Respondent.

First Appeal No. 299 of 1916, Decided on 4th August 1919, from decision of Dist. Judge, Bijapur, in Suit No. 2 of 1915.

Bombay Revenue Jurisdiction Act (10 of 1878), S. 4 (a)—S. 4 (a) bars suit against order of dismissal from patilki and for possession of patilki value—S. 4 (a) held not ultra vires by virtue of Government of India Act (1858), S. 65.

Plaintiff, who was a vatandar patil, was dismissed from his post and his life interest in the patilki vatan was forfeited. He brought a suit against the Secretary of State for a declaration that the order of dismissal was illegal and for possession of the vatan lands;

Held: (1) that the suit was barred by the provisions of S. 4 (a), Bombay Revenue Jurisdiction Act;

(2) that S. 4 (a), Bombay Revenue Jurisdiction Act, was not ultra vires of the Government by virtue of the provisions of S. 65 of the Government India Act, 1858, inasmuch as the plaintiff could not have brought a suit claiming the same relief against the old East India Company. [P 240 C 1,2]

Setlur, Ratanlal Ranchhoddas and *Hiralal J. Kania*—for Appellant.

S. S. Patkar—for Respondent.

Macleod, C. J.—The plaintiff in this suit was a sixteen-anna vatandar patil owning 23 vatan lands in the village of Talikot in the District of Bijapur. By Government Resolution No. 7950 of 26th August 1914 it was resolved that Government concurred in the opinion expressed by the Commissioner in para. 3 of the memorandum. Sanction was accorded to the dismissal of Ranchangauda Irangauda from the post of Revenue and Police Patil of the village of Talikot and to the forfeiture of his life interest in the patilki vatan of the village. He then brought this suit against the Secretary of State for India in which the following relief was claimed: (a) a declaration that the order of Government is illegal and does not legally effect forfeiture within the meaning of S. 61, Watan Act; (b) consequently the plaintiff is entitled to possession of the vatan lands with mesne profits from date of suit.

The District Judge dismissed the suit on ground that it was barred by S. 4 (a), para. 1, Bombay Revenue Jurisdiction Act, and that as he had no doubt in the matter he was precluded from referring the matter to the High Court under S. 13 of the Act. That section provides that subject to the exceptions thereafter appearing, no civil Court shall exercise jurisdiction with respect to any of the following matters: (a) claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognized under Bombay Act 3 of 1874 or any other law for the time being in force, or of any other village officer or servant, or claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such office or service.

There can be no doubt that the plaintiff's suit comes within the purview of those words, but it has been argued that that Act is ultra vires of Government in its powers of legislation on the authority of *Secy. of State v. Moment* (1). It was laid down in that case that the effect of S. 65, Government of India Act, 1858, was to debar the Government of India from passing any Act which can prevent a subject from suing the Secretary of State for India in Council in a civil Court in any case in which he could have similarly sued the old East India Company. The appellant therefore has to satisfy us that he could have sued the old East India Company claiming the relief which he asked for in the present suit. Counsel for the appellant was not able to refer us to any authority which could convince us that such a suit as the present one could have lain against the old East India Company. We were referred to Regulations 16 and 17 of 1827. But there is nothing in those regulations which provide that a claim to inam lands was cognizable by the Court of the East India Company. That is made clear by the preamble to Act 11 of 1852, which states:

"Whereas in the territories of the Deccan, Kandeish, and Southern Mahratta Country, and in other districts more recently annexed to the Bombay Presidency, claims against Government on account of inams and other estates wholly or partially exempt from payment of land revenue are excepted from the cognizance of the

ordinary Civil Courts . . . and whereas it is desirable that the said claims should be tried and determined without further delay",

the enactment was passed. Then under S. 2 the Governor of Bombay in Council was empowered to appoint an Inam Commissioner with so many assistants, and such subordinate establishment as might be necessary for the purposes thereafter mentioned. By S. 7 no decision or order of the Inam Commissioner, or of any of his assistants, or of the Governor in Council under the provisions of this enactment, so long as the same shall be in force under such provisions, shall be questioned or avoided in any Court of law.

It is thus perfectly clear that before 1858 such a claim as the plaintiff's in the present suit was not cognizable by the ordinary civil Courts. Therefore S. 4 (a) (1), Act 10 of 1876 was not ultra vires. Therefore, in my opinion, the decision of the learned District Judge was correct and the appeal must be dismissed with costs.

Heaton, J.—I agree. There is no doubt whatever—it is not pretended that there is any doubt on this point—that the present suit is barred by S. 4, Bombay Revenue Jurisdiction Act, if that section enunciates the law. But it is said that the section, at any rate in so far as it bars a suit of this kind, is ultra vires. It is for the appellant to show that this is so. He relies on the case of *Secy. of State v. Moment* (1). That throws us back on to S. 65, Statute 21 and 22 Vic. c. 106. That section and the case referred to open up a large variety of possible points, but so far as we have been able to inquire into the law as it existed when that Statute was enacted, i. e., in the year 1858, it is not shown that a suit would have lain against the East India Company for an act of this kind. In other words it is not shown that the provisions of the Bombay Revenue Jurisdiction Act are ultra vires in so far as they affect the suit. Therefore I think the appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

(1) [1912] 40 Cal. 391=40 I. A. 48=18 I. C. 22 (P.C.).

A. I. R. 1920 Bombay 241 (1)

MACLEOD, C. J.

Mahomed Ibrahim—Appellant.

v.

Shaikh Mahamad—Respondent.

Second Appeal No. 1164 of 1917, Decided on 7th October 1919, from decision of District Judge, Thanx, in Appeal No. 303 of 1914.

Dekkhan Agriculturists' Relief Act (17 of 1879), S. 15-B (1)—In suit for accounts and redemption Court can award interest and direct taking of accounts of mesne profits.

In a suit for accounts and redemption under the Dekkhan Agriculturists' Relief Act, a Court has power under S. 15-B (1) of the Act to award interest to the mortgagee and to direct the mortgagee to account for mesne profits. [P 241 C 2]

V. B. Virkar—for Appellant.*D. R. Manerikar* for *S. S. Patkar*—for Respondent.

Judgment.—The plaintiffs sued for accounts under the Dekkhan Agriculturists' Relief Act and redemption. Accounts were taken and by the decree of the lower appellate Court the plaintiffs had to pay into Court the amount of Rs. 1,961-2-0 with interest at 6 per cent on the principal amount of Rs. 1,895-0-5 from date of suit and costs of various kinds the whole amount to be paid by instalments of Rs. 300 every year commencing from any date in January 1915. The plaintiffs were held entitled to recover possession of the property mortgaged at once, the mortgagee being liable to account for profits received from the date of suit till restoration of possession to the plaintiffs. The mortgagee has objected to that part of the decree which gives him 6 per cent interest on the one hand and directs him to account for profits received from the date of suit till restoration of possession to the plaintiffs on the other hand. The argument was based on the decision of this Court in *Ramchandra Venkaji Naik v. Kallo Devji Deshpande* (1). But there the facts were entirely different as it was evidently held that the mortgage had been paid off at the date of suit and it was held by the Chief Justice that as the accounts were taken under the Dekkhan Agriculturists' Relief Act which are far more favourable to the mortgagor than the mortgage contract and as nothing was said in the Act as regards mesne profits from the date of suit the Court was not entitled although the

mortgage was paid off at the date of suit to order the mortgagee in possession to hand over mesne profits from the date of the suit onwards. But here the mortgage is continuing and the Court under the Dekkhan Agriculturists' Relief Act has taken an account of what was due on the mortgage up to the date of suit and under S. 15-B (1) has directed as to what shall happen after the date of suit. The Court has allowed interest to the mortgagee at 6 per cent and has directed the mortgagee to account for mesne profits. That the Court was entitled to do under the last lines of the subsection. It is impossible for me to imagine that the learned Judges in the Courts below who must have passed numbers of decrees of this nature were not acting in accordance with their usual practice and if that practice was wrong, it must have been long before considered in appeal in this Court. In my opinion the decision was correct and the appeal must be dismissed with costs.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1920 Bombay 241 (2)**

MACLEOD, C. J. AND SHAH, J.

Manchharam Bhiku Patil and others—Defendants—Appellants.

v.

Dattu Bhiku—Plaintiff—Respondent.

First Appeal No. 185 of 1916, Decided on 18th August 1919, from decision of 1st Class Sub-Judge, Dhulia, in Civil Suit No. 6 of 1914.

(a) **Hindu Law — Partition — Mother** — Among Sudras mother is entitled to share in partition among sons whether legitimate or illegitimate.

Among Sudras the mother is entitled to a share when the sons divide the property and the fact that some of the sons dividing the property are the illegitimate sons of her deceased husband cannot make any difference in the application of the rule. [P 242 C 1]

(b) **Hindu Law—Applicability—Leva Kunbis**

Leva Kunbis of Khandesh District are Sudras. [P 243 C 2]

Jayakar, Amin Desai, G. N. Thakor and *D. G. Dalvi*—for Appellants.*S. S. Patkar*—for Respondent.

Shah, J.—The plaintiffs in this case claimed to be the illegitimate sons of one Bhiku and sued to recover by partition their 3/5th share in the moveable and immovable properties left by Bhiku. Defendant 1 is the legitimate son of Bhiku, defendant 2 is his grandson, and

(1) A. I. R. 1915 Bom. 181=89 Bom. 587=30 I. O. 896.

defendant 3 Bhimabai who died during the pendency of the appeal in this Court was the widow of Bhiku. Bhiku died in July 1912.

The defence raised was that the parties belong to the Leva Patidar caste, and occupied the same status as the Leva Patidars in Gujarat and that as such they were either Kshatriyas or Vaishyas but not Sudras for the purposes of inheritance. The other defence raised was that the mother was entitled to a separate share at the partition.

The first class Subordinate Judge of Dhulia came to the conclusion that the parties were Sudras and that according to the Hindu law the illegitimate sons were entitled to half the share of the legitimate son. He also came to the conclusion that the mother was not entitled to a share and on the footing of these findings he passed a decree in favour of the plaintiffs for the equitable partition of the property awarding them 3/5th share as claimed by them.

From this decree the defendants appealed to this Court. Defendant 3, as I have said, died during the pendency of this appeal. Two points have been urged in support of the appeal one is a question of law and the other is a question of fact.

It is urged that the lower Court is wrong in holding that the mother is not entitled to a share when the illegitimate sons divide the property with a legitimate son and grandson. It is clear however that the mother is entitled to a share when the sons divide the property; and the fact that some of the sons dividing the property are the illegitimate sons of her deceased husband cannot make any difference in the application of the rule relating to the mother's share. The mother is entitled to a share when the sons divide the property and it does not matter whether the sons are entitled to divide the property equally or unequally. In view of the fact that the mother is now dead, it is pointed out on behalf of the respondents that the point has no practical importance. There had been no actual division of the property at the time of her death and the lower Court did not award any share to the mother. According to the decision in *Raoji Bhikaji v. Anant Laxman* (1) it is clear that the extent of the shares of the three illegitimate sons would be the

same now. That point therefore does not help the appellants in any way.

The second question is whether the lower Court is right in its conclusion that the parties are Sudras. The evidence on this point has been fully discussed on behalf of the appellants and in view of the fact found by the lower Courts as to the customs obtaining in the community to which the parties belong it is not necessary to examine the oral evidence in detail. It is found by the lower Court that the members of the community to which the parties belong

"have no Vedic rites and Sanskaras prescribed for the twice-born classes among them; that they have not the chief Sanskara, Munj, which makes a man Dwija; that they wear the sacred thread only occasionally; that this occasional wearing also is probably of a recent growth; that they have all the customs which one should expect among the Sudras, viz., adoption of a daughter's son and of a sister's son, divorce, Pat marriage, widow re-marriage and nontonsure of the widows which are all badges of an inferior or unregenerate caste."

as observed by the High Court in *Gopal Narhar Safray v. Hanmant Ganesh Safray* (2).

The fact that the members of this caste do not ordinarily wear any sacred thread and that all the rites which Dwijas may observe are not observed by them is indecisive. It may be said that many members of the Kshatriya and the Vaishya communities to one of which the parties claim to belong do not usually wear any sacred thread and that even they do not observe all the Brahminical rites. The manner in which the ceremonies are performed is also not very helpful in determining whether the parties are Sudras or not. But the finding as to certain customs obtaining among the Leva Kunbis of the place or the district to which the parties belong is far more important. The correctness of the finding is not questioned before us. The fact that the adoption of a daughter's son or a sister's son is prevalent in this community shows that the parties are Sudras for it is an established rule in this Presidency that the adoption of a sister's son or a daughter's son or a mother's sister's son is permissible only among Sudras without any proof of a special custom in favour of such adoptions. It is not suggested that the practice is based upon any special

(1) [1918] 42 Bom. 535=46 I. C. 750.

(2) [1879-79] 3 Bom. 273.

custom in this case. It is possible however to suggest that such a practice is attributable to a special custom. That could not be said of the practice of divorce, Pat marriage and widow re-marriage which supports the conclusion of the lower Court. It is clear that the caste in which these customs are proved to obtain can reasonably and properly be treated as Sudras and the inference of the lower Court based on these facts appears to me to be right.

The oral evidence adduced by the plaintiffs goes to show that the parties are Sudras. In fact one witness who is an elderly man and a Bhauband of the deceased Bhiku, admits that he considers himself a Sudra. The evidence of the school-master (Ex. 103) which appears to be reliable helps the plaintiff's case. The parties are Leva Kunbis residing at Changdev in the East Khandesh District. The evidence led on behalf of the defendants does not appear to me to establish any fact of any real value which could afford a reasonable answer to the inference suggested by the evidence adduced on behalf of the plaintiffs. The important witnesses examined on behalf of the defendants are Leva Kunbis of other districts and their evidence is not of much use. It is urged however that apart from the oral evidence historically the Leva Kunbis in the Khandesh District belong to the same stock as the Leva Kunbis of Gujarat that they migrated from Gujarat some centuries ago, that they must be accorded the same status which the Leva Patidars occupy in Gujarat and that the Leva Patidars in Gujarat are Kshatriyas or Vaishyas. Several passages from the Bombay Gazetteer, Vol. 9 part 1, (Gujarat Population) and Vol. 12 (Khandesh) have been cited to us to show the origin and history of the Leva Patidars in Gujarat and that the Leva Kunbis migrated to Khandesh some centuries ago. It is needless in my opinion to examine these passages in any detail and to express any opinion as to the status of the Leva Patidars or Kunbis in Gujarat. Assuming for the sake of argument that the community to which the parties belong originally migrated from Gujarat several centuries ago and that the Leva Kunbis of Gujarat are not Sudras it does not necessarily follow that they have retained in modern times the same cus-

toms and status as the Leva Kunbis in Gujarat may have retained. The recent history of the caste as disclosed in the evidence shows the adoption of customs which are indicative of their present status as Sudras and that in my opinion is sufficient for the purpose of this case. It is to be noted that the caste to which the parties belong and which used to be described originally as Kunbi caste has recently been described according to the evidence as Leva Kunbis and it seems to me that an attempt has been made on behalf of the defendants to show if possible a higher status with a view to escape the liability in the present suit. The description of the caste "Pajne Kunbis," which was originally given to this caste has apparently been changed to "Leva Kunbis" during the last twenty years. It seems to me on the evidence that the caste to which the parties belong are Sudras whatever may have been the real status of the ancestors who migrated from Gujarat.

It is no doubt true that the test of occupancy may be applied in determining the status of a particular caste. If that is applied in this case it may be urged that the occupancy of agriculture does not necessarily indicate that the parties are Sudras as the occupation of agriculture is permissible to the Vaishya caste according to the ancient texts. But according to those texts agriculture as an occupation was permitted to the Sudras also. It is a matter of common knowledge that among cultivating classes there are many Sudras and the fact that the Leva Kunbis are generally agriculturists is by itself not sufficient to establish that they are not or cannot be Sudras. The conclusion that the parties are Sudras is supported by the remarks in Steel's Law and Custom of Hindu Castes at pps. 100 and 101 relating to Kunbis. I am satisfied that the conclusion reached by the lower Court that the parties in this case are Sudras is correct and that the special rule laid down in the Mitakshara allowing illegitimate sons certain share in the property of their father must be applied to this case. I would therefore confirm the decree of the Court and dismiss the appeal with costs.

Macleod, C. J.—I agree.

G.P./R.K.

Decree confirmed.

A. I. R. 1920 Bombay 244

MACLEOD, C. J. AND HEATON, J.

Narhari Hari Vaidya—Plaintiff—Appellant.

v.

Ambabai Balkrishna Sansarikar and others—Defendants—Respondents.

Second Appeal No. 756 of 1917, Decided on 25th August 1919, from decision of 1st Class Sub Judge, Nasik, in Appeal No. 32 of 1916.

(a) Evidence Act (1 of 1872), S. 32—Statement about amount of expenses for particular purpose in question contained in will is inadmissible under S. 32 being not against pecuniary interest—Memo of accounts by deceased unless made in course of business is also not admissible.

Where in a suit a question arises as to the amount of money spent by a deceased person for a particular purpose, a statement in his will specifying the amount so spent is not admissible in evidence under S. 32, inasmuch as the statement is not made against the pecuniary or proprietary interest of the deceased. [P 244 C 2]

A memo. of expenses made by the deceased is also inadmissible in evidence, if it was not made in the ordinary course of business.

[P 245 C 1]

(b) Practice—Evidence—Absence of objection does not make evidence relevant or admissible.

The erroneous omission before the lower Courts to object to the admission of evidence does not make that evidence relevant and the High Court must entirely disregard such evidence. [P 245 C 1]

D. S. Varde—for Appellant.

D. C. Virkar—for Respondents.

Macleod, C. J.—The plaintiff sued to recover possession of the plaint property, Rs. 330-8-0 for arrears of rent and future rent at Rs. 10 per month until possession alleging that the property was ancestral property of the plaintiff; that it was almost completely built by his father Hari; that at the time of Hari's death building materials to the extent of Rs. 800 were left; that Hari died on 16th July 1904; that after Hari's death the affairs of the minor plaintiff were looked after by other persons; that Annaji, the deceased father of the defendants, undertook to complete the plaint house on condition that the building materials were to be used; that the house was to be kept in repairs out of rent; that Annaji incurred expense to the extent of Rs. 100 to Rs. 150 in completing the house; that after Annaji's death in 1912, although plaintiff's guardian demanded possession, possession was not delivered.

The trial Court decreed that the defendants should put the plaintiff in pos-

session of the plaint property; that the defendants should pay to the plaintiff Rs. 110 8-0 and interest on Rs. 110-8-0 at 6 per cent. per annum from the date of decree till satisfaction, and that the defendants should pay rent at Rs. 6 per mensem to the plaintiff from institution of the suit till the happening first of any one of the three events mentioned in O. 20, R. 12 (1) (c), Civil P. C. On appeal the lower appellate Court directed that the plaintiff should recover possession of the house on payment of Rupees 664-0-0 to the defendants.

The main question in the suit is what was the amount spent by Annaji, the father of the defendants, in completing the building? The defendants said that the amount was Rs. 730, and they relied upon Annaji's will and a memo. of expenses prepared by Annaji, which showed that Annaji had spent that amount. It does not appear that any objection was taken in the trial Court to the admission of the Will and the memo. as evidence. The trial Judge held that the memo. was a useless piece of evidence. There was nothing to support the version of the defendants that Rs. 730 were spent on the plaint house save the mention made in the will, and apparently the trial Judge did not rely upon the statement in the will.

In appeal again it does not seem to have been argued that the will and the memo. were inadmissible in evidence. The learned Subordinate Judge said that Annaji's relationship with plaintiff and Annaji's willingness to complete the house at the request of the Panches led him to say that Annaji would not name a bogus sum in his will. The memo. was carefully examined by him which showed that all the items except the two items of Rs. 38-8-0 and Rs. 27-8-0 were spent on the repairs of the house, and after taking an account he came to the conclusion that the plaintiff was to pay Rs. 664 to the defendants.

It has now been urged before us in second appeal that neither the will nor the memo. was admissible under S. 32, Evidence Act, and it seems quite clear to us that that contention is a sound one, as the statement in Annaji's will that he had spent Rs. 730 in effecting the repairs of the house is not a statement made against the pecuniary or proprietary interest of Annaji, nor can it

be said that the memo., said to be made by him was made in the ordinary course of business. The Legislature has provided that statements made by deceased persons shall only be admissible in evidence when certain conditions are fulfilled. We are satisfied that neither the will nor the memo are admissible under S. 32, Evidence Act. But it has been argued that in second appeal we should not consider the admissibility of this evidence as no objection was taken to its admission in either of the lower Courts. At first sight that seems a reasonable proposition, as if pleaders in the lower Courts do not take objections to the admission of evidence, then the Judges in the lower Courts do not consider whether it is admissible or not and we do not have the advantage of their opinion on that question. But it has been laid down by the Privy Council in *Miller v. Babu Madho Das* (1) that the erroneous omission before the lower Courts to object to the admission of evidence does not make that evidence relevant and therefore their Lordships in the appeal before them laid down that they must, as the High Court ought to have done, entirely disregard that evidence. Following that decision, we must in this appeal entirely disregard the will and the memo. The result follows that they are not evidence, and that they cannot be relied upon to prove what Annaji spent on this house. In our opinion therefore the appeal must succeed and the decree of the trial Court restored. The defendants must pay the plaintiff's costs in this Court and in the lower appellate Court.

G.P./R.K.

Decree reversed.

(1) [1897] 19 All. 76=23 I. A. 106=7 Sar. 73.
(P. O.).

* A. I. R. 1920 Bombay 245

MARTEN, J.

Daisy Amelia Borgonha—Petitioner.

v.

Wilfred Churchill Borgonha—Respondent.

Ordinary Original Civil Matrimonial Suit No. 2927 of 1919, Decided on 2nd March 1920.

* Diverge Act (4 of 1869), S. 3 (1)—Parties residing within jurisdiction though separately at time of petition—Court has jurisdiction to hear petition.

If both parties to a petition for divorce are resident within the jurisdiction of the Court at

the time of the presentation of the petition the Court has jurisdiction, under S. 3 (1) to hear the petition, notwithstanding that the parties are residing separately from each other.

[P 248 C 2]

Campbell—for Petitioner.

Judgment.—This is a wife's petition for divorce on the ground of her husband's adultery, cruelty and desertion.

The case is undefended but raises a question of some importance, viz., whether this Court has jurisdiction to hear a petition where the parties last resided together outside the jurisdiction, but at the date of the petition are residing within the jurisdiction separately and not together. This depends on the directions given in S. 3 (1) Diverge Act, 4 of 1869, as to which High Court petitions under that Act are to be presented.

The point was not raised until after the bulk of the evidence had been taken. I will accordingly deal with the matter in the same order, and state the facts first.

The parties are domiciled Anglo Indian Christians of the Protestant faith. They were married at Agra on 31st October 1898. They resided at various places after their marriage and finally at Muttra, which was the last place where the parties resided together. That place is outside the jurisdiction of this Court under the Diverge Act. There is one child of the marriage—a daughter now aged 13, and she is and has for many years past been maintained by the petitioner.

The respondent deserted the petitioner about 1907, and thereupon the petitioner went to live at Agra with her parents taking the child with her. For a time she lost all trace of her husband. In 1911 she took legal advice at Lucknow, and also asked the police to trace her husband's whereabouts. In the course of that year she received information that he was at Mysore, and later on, that he had left Mysore and gone to Madras. In 1913 the petitioner met her husband at Lucknow. He then requested her to return to him and promised to reform certain habits of his. The petitioner replied that he had so often broken his promises, that she could not rely on his word, but that if he did come and reform she would consider the proposal. He did not, however, come to

Lucknow and she heard nothing more of him till 1918.

In June 1919, the petitioner obtained employment in Bombay and took up her residence there, which she has continued up to the present date. She then ascertained that her husband had found employment in Bombay since 1915, first at the Military Hospital, Colaba, and subsequently on the R. I. M. SS *Investigator*. The copy of official records of the Indian Subordinate Medical Department (Exs. J. 1 and 2) to which the respondent belongs, show that though in 1907 the respondent admitted the existence of his wife and child, he suppressed that fact in 1916 and posed as a single man. This is quite in keeping with what he appears to have done in 1911 judging from the letter, Ex. E, which the petitioner received, viz, pretending his wife was dead and paying attentions to a girl in Madras on the footing that he was free to marry. As the result of enquiries at the R. I. M. Dockyard, the petitioner found that her husband had gone on leave to Bangalore to stay with his mother. She accordingly went there after him in August 1919 and had an interview with him. At that interview the husband lost his temper and struck the petitioner and also abused her. Police Court proceedings followed in which the charge of assault was compounded, the husband apologized and an order for maintenance was made. In fact, the husband only paid one sum of Rs. 75 for maintenance and has paid nothing since.

Later on, the petitioner obtained certain information as to her husband's adultery and on that information this petition was filed on 25th September 1919. Subsequently, on further information, the petition was amended and re-sworn on 20th October 1919. The original petition was served on the respondent on 4th October 1919 on board the *Investigator* in Bombay Harbour. The amendments in the petition were served on the respondent on 22nd October 1919 in Esplanade Road, Bombay.

As regards the charges of adultery on board the *Investigator* while in Dry Dock in Bombay in August 1917, and also on shore at Karachi in 1918, I am quite satisfied that both these charges are made out. It is unnecessary for me to go into any details, but as regards the latter charge, I think it reasonably clear that

the Madras woman, Maryammal staying with the respondent at Karachi is the same person as Maryammal, the writer of the Tamil post card (Ex. H.), dated the 15th August 1919 and addressed to the respondent at the Government Dockyard, Bombay, which the petitioner saw on making enquiries there. I am also of opinion that the charge of desertion is made out. Further I think that the evidence is sufficient to establish the charge of cruelty.

The delay in taking the proceedings is I think, explained, and I am satisfied that there is nothing before me to lead one to suppose that there is anything in the nature of connivance or collusion in the case.

As regards the evidence, I may state generally that the petitioner impressed me favourably on both occasions when she was in the witness-box, and that I see no reason to doubt her evidence or that of the other witnesses.

That brings me to the point of jurisdiction which I have referred to. That depends on the true construction of the following words in S. 3, viz, (1):

"In this Act, unless there be something repugnant in the subject or context in the case of any petition under this Act, 'High Court' is that one of the aforesaid Courts within the local limits of whose ordinary appellate jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together."

What then is the meaning of the concluding sentence? Does the word "together" govern the word "reside" as well as the word "last resided," or does it only govern the words "last resided?" If, for instance, the concluding sentence was written out in full, ought it to run

"..... within ... whose jurisdiction the husband and wife reside together or last resided together"

or should it run

"..... within whose jurisdiction, the husband and wife reside or the husband and wife last resided together."

Now, I think one very cogent reason for not making the word "together" govern the word "reside" is that one can hardly imagine any case in which the husband and wife would be residing together at the date of the presentation of a divorce petition. For one thing to do so would almost inevitably raise the strongest suspicion of collusion or connivance, and lead to the petition being dismissed. For instance, a wife's peti-

tion must depend on adultery plus either desertion or cruelty. Obviously, in no petition founded on desertion could the parties be living together at the date of the petition. And it is difficult to imagine any case in which a wife who is charging her husband with adultery and cruelty, would still be residing with him. On the other hand, it would be quite natural, I think, for the legislature to found a jurisdiction on the presence within the jurisdiction of both parties at the date of the presentation of the petition. *Prima facie*, this would be the most convenient forum to try the case.

It is true that an alternative is given. But one can well understand the legislature giving a petitioner the alternative of bringing the suit within the jurisdiction of the last matrimonial residence, and that the legislature should in effect select this as the sole jurisdiction in cases where at the date of the petition both parties were not residing within the same jurisdiction.

Looking at the sentence from a purely grammatical point of view, I think it by no means follows that the word "together" governs "reside." If the printer had put a comma after the word "reside" it would, I take it, be clear that "together" would not govern "reside." But whether or no there is a comma in the original Act, I do not propose to let my decision depend on the punctuation which the printer thought fit to adopt.

The authorities on the point seem very meagre. Despite an adjournment, counsel has only been able to produce two cases really in point. These cases differ in their conclusions and are decisions not on S. 3 (1), but on similar directions in S. 3 (3), with reference to District Courts.

The first is *Nash Durand v. Rebecca Durand* (1), a decision in 1870 by a Bench of three Judges in Calcutta, confirming a decree of the Recorder of Rangoon, which dissolved a marriage on the husband's petition. As the Act then stood the Recorder of Rangoon was the "District Judge" in Pegu within the meaning of S. 3 (2) and (3). There, at the date of the petition, the husband and wife were both living in Pegu, but in different parts of Pegu. There is nothing whatever in the report to show that the parties last resided together within the

jurisdiction of the Rangoon Court. On the contrary, the only matrimonial residence mentioned in the report is Madras. The judgment states at the outset the separate residences in Pegu at the date of the petition, next states that the case is a very clear one. Then, after setting out certain other facts, the learned Judges say that the jurisdiction is clear from the Record but the Recorder ought to have stated in his judgment the facts on which that jurisdiction was founded. The learned Judges do not specifically mention the point I have to decide, but it is clear that their attention was expressly drawn to the question of jurisdiction, and that they thought the Court had jurisdiction in that case. This decision must, I think, have been based on the separate residences within the jurisdiction at the date of petition. Otherwise, the learned Judges would have committed the very fault which they attributed to the Recorder, viz., not stating the facts on which the jurisdiction rested. In my opinion, the case is an authority in favour of the present petitioner.

The other case is one decided in 1892 on the appellate side of this Court where by a majority of two to one, the Court held that the word "together" governs the word "reside" in S. 3 (3). They accordingly reversed a decree for dissolution of a marriage which had been passed by a Mufassil Court. The case is *Sarah Xavier v. Samuel Francis Xavier* (2). There Birdwood J., and Telang, J., held that there was no jurisdiction to hear the petition, but Jardine, J., thought there was. The facts were that at the date of the petition the husband was in jail at Nagpur, and the parties last cohabited at Bhusawal, which is outside the jurisdiction of the Nagpur Court. Curiously enough, Telang is the only Judge who mentions the extreme improbability of the parties residing together at the date of the petition, and even he only refers to the case of desertion. He says:

"But the living together seems to me to be the important matter. I presume the words about last 'residence' were introduced to meet such cases, for instance, as where the husband, having deserted the wife, there is no jurisdiction possible based on a present residence together; while it may be assumed that husband and wife must have lived together somewhere after marriage, and the jurisdiction would in such a case therefore go under the words 'last resided' to the

(2) [1892] 1 P. J. 158.

Court of the place where such living took place. I think this is what was intended, and I do not see any such serious inconvenience resulting from this construction as to lead one to suppose that it cannot have been intended."

If it had been really present to the minds of the learned Judges that the legislature could never have contemplated the parties living together at the date of the petition, I do not think Telang, J., and Birdwood, J., would have arrived at the conclusion they did. It may be that the Court did not have the advantage of any argument from counsel, or had only an imperfect argument; and this would seem to be borne out by the fact that *Nash Durand v. Rebecca Durand* (1) was not mentioned by the Court, while, on the other hand, the case of *Wingrove v. Wingrove* (3) on the next page was relied on by Jardine, J. *Wingrove v. Wingrove* (3) is however clearly distinguishable, for, as is pointed out by Birdwood, J., one of the parties there was living outside the jurisdiction at the date of the petition. The only jurisdiction available therefore was that of the "last residence together."

As regards the question of inconvenience referred to by Telang, J., if the Bombay jurisdiction is not available in the present case, the parties and their witnesses would have to travel over 300 miles from Bombay to get their suit decided.

There are two other cases from Calcutta which have been cited to me. Both of these are decisions of Fletcher, J., viz., *Bright v. Bright* (4) and *Francesco Giordano v. Flora Giordano* (5). Neither case deals expressly with the point before me, and the actual decisions are irrelevant. The latter case would however be relevant, if Shillong in Assam was outside the jurisdiction of the Calcutta High Court at the date of the presentation of the petition in 1912. There the parties last cohabited at Shillong, but at the date of the petition were living in Calcutta in separate residences. The report does not show on which particular branch of S. 3 the Court was relying for its jurisdiction, and as Shillong appears to be in a Native State, I do not think it would be safe to rely on this case without further inquiry as to the facts and jurisdiction. If however Shil-

long was then outside the jurisdiction, then the case would be an additional authority in favour of the petitioner.

As regards the parties of this Court, I have made inquiries from my brother Kajiji, who was Prothonotary for many years, and also from the present Prothonotary, Mr. Malabari. They are both of opinion that the practice of this Court has been to accept as sufficient foundation for the jurisdiction a residence of both parties within the jurisdiction at the time of the filing of the petition. They have further been good enough to assist me by looking up the records of recent matrimonial cases in this Court. These records certainly tend to show that in some petitions the draftsmen were relying for the jurisdiction on present separate residences within the jurisdiction. But for the moment, no case clearly on all fours with the present one has been found. I may however add that the present petition was admitted by the then Acting Prothonotary Mr. Patel, and that an order for alimony under it was made by my brother Pratt on 14th November 1919, and that the experienced counsel who settled the petition and appeared at the hearing was evidently of opinion that the jurisdiction was clear.

I have considered whether it would not be proper for me either to report the case to my Lord the Chief Justice, under R. 63 of our High Court Rules for hearing by a Bench of two or more Judges, or, alternatively, to dismiss the petition having regard to *Sarah Xavier v. Samuel Francis Xavier* (2), so that the question of jurisdiction might be determined by an appellate Court. But as there is a conflict of authority, I think I am entitled with very great respect to the learned Judges in *Sarah Xavier v. Samuel Francis Xavier* (2), to act on my own opinion of the Act, and nonetheless so because the parties can hardly be in a financial position to stand the expense of further litigation.

The conclusion therefore which I have arrived at is that if both parties are resident within the jurisdiction at the time of the presentation of the petition, this Court has jurisdiction to hear it under the Divorce Act notwithstanding that the parties were then residing separately from each other.

That brings me to the last question of fact, viz., whether the parties were then

(3) [1970] 14 W. R. 416.

(4) [1909] 36 Cal. 964=4 I. C. 419.

(5) [1913] 40 Cal. 215=20 I. C. 512.

resident within the jurisdiction. It is clear that the petitioner was so resident. She was then engaged in a business establishment in this city and had been so for several months. Her residence therefore was "bona fide" and not casual or as "a traveller": see *Nusserwanji Pestonji Wadia v. Eleonora Wadia* (6).

As regards the respondent, his case requires more consideration. But I think I may fairly hold on the evidence that his residence also was in Bombay. It appears that during 1917-1919 he was lent by the War Hospital authorities at Colaba to the R. I. M. SS *Investigator* which was engaged in mine sweeping during part of that time, and that the home port of the *Investigator* was Bombay. It appears also that on 4th October 1919, when the petition was served on him, he wrote to the Prothonotary giving the address "SS. *Investigator*, Bombay:" See Ex. K. The post card from the Madrassese woman (Ex. H.) is also addressed to him at Bombay. The amendments in the petition were served on him in the streets of Bombay and the official statement (Ex. L) shows, that on the very next day he reverted to his military service at Colaba. The petitioner saw him at Colaba Hospital on duty there only a few days ago and as I think the fair inference is that he has been there ever since October 1919. For these reasons, I think I may hold, as I do, that he was residing in Bombay within the jurisdiction of this Court at the date of the petition and the amendment thereof.

Mr. Campbell did submit an alternative argument to me based on certain observations of Sir Basil Scott in *Nusserwanji Pestonji Wadia v. Eleonora Wadia* (6) which I confess, I have some difficulty in understanding. The argument was that the High Court preserved its divorce jurisdiction under S. 35 of the Letters Patent, quite irrespective of the Divorce Act, and that therefore I was in a position to deal with this matter under the Letters Patent irrespective of the Divorce Act. I however pointed out to counsel that this argument appeared to be in flat contradiction of S. 4, Divorce Act, which provides that:

"the jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and

in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise."

Further, S. 45, Divorce Act, which embodies the Civil Procedure Code, is expressly made "subject to the provisions herein contained." One cannot therefore rely on S. 20 (formerly S. 17), Civil P. C. as if S. 3, Divorce Act, did not apply here. Under these circumstances, counsel did not pursue this line of argument. Under S. 3 parties here could clearly go to the Court having jurisdiction where the parties last resided together. I have not therefore a case to deal with where there never was any matrimonial residence, e. g., if the parties had separated at the Church door and never lived together. I say nothing as to the jurisdiction in any exceptional case such as that.

In the result, I pronounce a decree nisi for dissolution of the marriage. I give the custody of the child to the petitioner and direct the respondent to pay the costs of the petitioner. Any application for alimony may be left to be dealt with in Chambers.

I wish to add that I think it would be convenient if all divorce petitions contained a definite statement as to the jurisdiction relied on. This is very frequently done already, but it was omitted in the present case.

G.P./R.K.

Decree accordingly.

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MACLEOD, C. J. AND HEATON, J.

Dalichand Shivram Marwadi—Plaintiff—Appellant.

v.

Lotu Sakharam Pardhi—Defendant—Respondent.

Second Appeal No. 848 of 1916, Decided on 13th October 1919, from decision of Dist. Judge, Khandesh, in Appeal No. 9 of 1916.

(a) Transfer of Property Act (4 of 1882), S. 59—Ordinarily scribe is not attesting witness.

Under S. 59 for a deed to be regarded as validly executed, it must be signed by two witnesses as attesting witnesses; ordinarily a scribe or writer of a document is not intended to be and is not an attesting witness. [P 250 C 1, 2]

(b) Evidence Act (1 of 1872), S. 68—Attesting witness explained.

The expression "attesting witness" in S. 68 means a witness who has seen the deed executed and who signs it as a witness. [P 250 C 2]

(6) A. I. R. 1914 Bom. 211=20 [I. O. 492=38 Bom. 125.

W. B. Pradhan—for Appellant.

H. B. Gumaste—for Respondent.

Macleod, C. J.—The plaintiff filed this suit to recover on a mortgage-bond the sum of Rs. 100 for principal and Rs. 100 as interest with costs and future interest. Defendant 1 admitted execution and consideration. But a preliminary issue was raised, whether the mortgage deed sued upon was valid under S. 59, T. P. Act. The learned Judge in the trial Court said:

"I examined the plaintiff to-day and he admits, as indeed he is bound to do that the deed was written and signed at the writer's house where one of the attestants put his attestation on the deed. But the other witness attested the document in the Sub-Registrar's office. It is evident therefore that there is no proper attestation of the document as required by the Transfer of Property Act."

The suit was therefore dismissed.

In appeal the same question was raised and the appeal was dismissed by the learned District Judge. It would seem at first sight that the judgments of both the lower Courts are perfectly correct. But we have been referred to a decision of this Court in *Govind Bhikaji v. Bhau Gopal* (1), which was decided after the decision of the lower appellate Court. In that case on the evidence the Court said:

"The writer of the document signed his own name under the description of the executant's mark. His object in so doing presumably was, and the effect of his so doing, in the opinion of the Court was, to authenticate the mark, that is to say, to vouch the execution; in other words, this last signature was made not as a scribe, but as an attesting witness."

Now if there had been evidence in this case that two witnesses had signed as attesting witnesses, then no doubt there would have been a valid mortgage under the provisions of S. 59, T. P. Act. We are asked in second appeal in consequence of that decision, either to hold on the facts in this case that the scribe putting his signature at the end of the document would be sufficient evidence that he signed as an attesting witness, or to send the case back to the trial Court to take further evidence to show that the scribe did sign as an attesting witness. This question was considered in *Ranu v. Laxmanrao* (2), where it was held that the scribe could not be considered as an attesting witness, because his name occurred before the names of the executing parties and formed part of the body of

the document. Reference was made to the case of *Burdett v. Spilsbury* (3), where Lord Campbell said:

"What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness."

This we think is the meaning of "attesting witness" in S. 68, Evidence Act, and we therefore hold that the writer in the circumstances of this case cannot be treated as an attesting witness.

I should myself be very disinclined to hold that in any case a scribe, wherever he wrote his name, could be considered to sign the document as an attesting witness, unless he actually said so in the document. There is a very great difference between an attesting witness and a scribe, and it would seem to me that it would lead to attempts to evade the plain words of S. 59 and would also lead to constant difficulties hereafter, if the law was not strictly observed, since parties might think that they were executing a valid mortgage, if only one outside person was brought in to witness the document, and evidence would have to be called to show that the scribe as a matter of fact did sign as an attesting witness. I think the case of *Govind Bhikaji v. Bhau Gopal* (1) must be taken to stand on its own facts. But I also think we must observe the test laid down by the Privy Council in *Shamu Patter v. Abdul Kadir Rowuthan* (4) and also in *Ranu v. Laxmanrao* (2), which in my opinion lay down the correct principle to be followed, namely, that an attesting witness must clearly sign as such. Therefore I think the appeal ought to be dismissed with costs.

Heaton, J.—I agree. Broadly speaking, a scribe or writer of a document is not intended to be and is not an attesting witness. But he may be such a witness in certain cases. It was for example held in the case of *Govind Bhikaji v. Bhau Gopal* (1) that the scribe there was an attesting witness. That could only have been held on a consideration of the evidence in that case. No evidence has been taken in this case to enable the Court to ascertain whether the scribe was or was not an attesting witness. It is therefore not established that he was. That being so, it is not established that the mortgage

(1) [1917] 41 Bom. 884=39 I. C. 61.

(2) [1909] 33 Bom. 44=1 I. C. 464.

(3) [1843] 10 Cl. & F. 340=59 R. R. 105=8 E. R. 772.

(4) [1912] 25 Mad. 607=16 I. C. 250=39 I. A. 218 (P. C.).

deed in this case was a duly executed mortgage deed. Therefore I think the appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

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SCOTT, C. J. AND HAYWARD, J.

Shrinivasdas Lakshminarayan—Plaintiff—Appellant.

v.

Ramchandra Ramrattandas — Defendant—Respondent.

Original Civil Appeal No. 38 of 1918, Decided on 31st March 1919.

Contract Act (9 of 1872), S. 23.—Contract for sale and purchase of sovereigns held not opposed to public policy and commission could be recovered.

Plaintiff was employed as a commission agent by the defendant for the purchase and sale of sovereigns. He entered into several contracts on behalf of the defendant for this purpose and the defendant became liable to him for a specific sum. The defendant paid a portion of this and refused to pay the balance, whereupon the plaintiff brought the present suit to recover that balance. The defendant contended, inter alia, that the transactions were against law and public policy and that the plaintiff was not entitled to sue in respect thereof. The trial Court dismissed the suit, on the ground that the contracts were opposed to public policy as tending to defeat the whole scheme of the Government finance. The plaintiff appealed, and the main contention for the defence was that the contracts were contrary to public policy;

Held: that the contracts did not offend against any clear general head of public policy to warrant the conclusion that, on that ground they were unlawful; and that the plaintiff was entitled to a decree for the amount claimed by him. [P 254 C 2, P 255 C 1]

Kanga and R. D. N. Wadia—for Appellant.

Jayakar and Makanki Mehta—for Respondent.

Scott, C. J.—This is an appeal from a judgment of Beaman, J. dismissing the plaintiff's suit.

The plaintiff sues for damages occasioned by his upcountry constituent failing to perform contracts for the purchase of sovereigns entered into for him by the plaintiff for the Vaishakh and Jeth Vaidas of 1918.

The damages claimed were assessed as of 1st July 1918 and no objection is taken to this date.

On 22nd August 1918 a notification under the Defence of India Act (4 of 1915) was issued as follows:

"No person shall sell or purchase or offer to sell or purchase any coin for an amount exceeding the face value of such coin or shall

accept or offer to accept any such coin in payment of a debt or otherwise for an amount exceeding its face value."

By the same notification 'coin' was defined as coin which is legal tender under any enactment for the time being in force in British India.

Under the Indian Coinage Act, 1906, a sovereign is legal tender for Rs. 15. The explanation to the notification says that for the purposes of the rule the face value of the sovereign shall be deemed to be Rs. 15.

The contract having come to an end by the defendant's breach which is not disputed, the subsequent notification does not operate so as to make it an illegal contract under the rule stated in *Brewster v. Kitchell* (1):

"that if H covenants to do a thing which is lawful and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed."

It is however contended that the contracts were illegal in their inception under a previous notification of 9th July 1917 in the following terms:

"No person shall melt, break up or use otherwise than as currency any current gold or silver coin."

But a contract to purchase sovereigns is not in itself a user of the coins to be purchased, nor is there any evidence to establish that the ultimate buyer would use the sovereigns purchased otherwise than as a store of currency to be available in the event of the silver or paper token currency losing its purchasing power.

There remains therefore for the defence the main contention on which the lower Court held against the plaintiff, viz., that the contracts for breach of which damages are claimed were contrary to public policy.

It is no doubt open to the Court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the Court regards as public policy. This is laid down in S. 23, Contract Act, and in India therefore it cannot be affirmed as a matter of law, as was affirmed by Lord Halsbury in *Janson v. Drifontein Consolidated Mines Limited* (2), that no Court can invent a new head of public policy, but the dictum of Lord Davey in the

(1) [1693] 1 Salk 198=91 E. R. 177.

(2) [1902] A. C. 484=71 L. J. K. B. 857=87 L. T. 372=51 W. R. 142=7 Com. Cas. 268=18 T. L. R. 796.

same case that "public policy is always an unsafe and treacherous ground for legal decision" may be accepted as a sound cautionary maxim in considering the reasons assigned by the learned Judge for his decision.

The following is, I think, a fair analysis of the reasons given by the learned Judge in the form of numbered propositions.

1. The definition of "public policy" is not exhausted by saying that only that can be said in the eye of the law to be against public policy which is either penal or unrecognized by Statute or Common law.

2. Public policy is a much wider term and in its turn capable of sudden extensions under abnormal and temporary conditions.

3. It is doubtful whether such a situation as that created by wild gambling on the part of a very small body of purely selfish speculators in Bombay could possibly exist except under a bimetallic system.

4. In India we have a silver and a gold currency between which the Government has endeavoured to fix a definite ratio.

5. The effect of gambling in the gold coinage has been to disturb that ratio and give gold a very much higher relative value to silver than merely as one branch of the currency it ought to have.

6. It is not a question of morality as have been the majority of cases where in England public policy has been the ratio decidendi.

7. Morality cannot apply to a case where the decisive factor is the maintenance at a very critical moment of the efficiency of the Government.

8. Conduct of private individuals tending to defeat and embarrass the whole scheme of Government finance must be opposed to public policy.

9. Money, apart from the metal of which it is made, is never intended for purposes of sale.

10. Therefore it ought not to be a medium of gambling speculation.

11. Under a bimetallic system its public function cannot be properly discharged if speculating in one or other of the branches of the currency materially alters the ratio which the financial operations of the Government require to be made permanent.

12. In order to finance great war operations and for internal administration a very considerable mass of gold currency was thrown into circulation.

13. What immediately happened showed that the desire for gold not for currency but for adornment or hoarding was withdrawing the whole of this gold currency from circulation and so defeating the Government's object.

14. In periods of emergency and crisis Government has the right to expect that the greed of gamblers shall not be given free play so as to disorganise financial policy.

15. In India public policy is at present defined by and coincides with the measures of Government.

16. Therefore in a peculiar case like this it would be difficult to get a clearer indication of what is opposed to public policy than the Government notification on the subject.

17. It is not correct to say that transactions in sovereigns at a price above the face value were made contrary to public policy in August 1918.

18. They must have been contrary to public policy already. The notification merely declares what was long felt, that it was contrary to public policy.

19. If contrary in August it must have been so in June.

20. The general tenor of the notification of June 1917 showed that in the opinion of the Government any trafficking in gold coinage was opposed to the general interest of the country. So the speculators may very well have known that though within the letter of the 1917 notification they were running counter to its spirit.

21. In many cases buying a large quantity of sovereigns may be legitimate and even necessary, but dealings of the kind in suit certainly had no other object in view than changing the relative values of rupee or sovereign as the bulls or bears proved successful.

Substantially the judgment comes to this:

A. Courts in India are not to be limited by English decisions in deciding what is and what is not contrary to public policy, for public policy is capable of sudden extensions under abnormal and temporary conditions.

B. The question of the maintenance of a bimetallic currency system is one

which does not arise in England. Speculators are able to disturb the equilibrium of such a system and this is contrary to the public interest here in times of crisis such as the recent war.

C. In India public policy is defined by and coincides with the measures of Government. The notification of July 1917 showed Government wished to prohibit the use of gold coins except for the purpose of currency. The notification of August 1918 shows that trafficking in such coins had for sometime therefore been contrary to public policy and speculators should have known that though not transgressing the letter of the notification of 1917, they were running contrary to its spirit in offering for sovereigns a price higher than the face value as fixed by Indian enactments.

The objection to accepting such a proposition as A is forcibly stated in the passage from Marshall on Insurance cited by Lord Halsbury in *Janson v. Driefontein Consolidated Mines, Limited* (2), at p. 491:

"To avow or insinuate that it might, in any case, be proper for a Judge to prevent a party from availing himself of an indisputable principle of law, in a Court of Justice, upon the ground of some notion of fancied policy or expedience is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the legislature, which alone has the power to decide on the policy or expedience of repealing laws or suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the finespun speculations of visionary theorists, or the suggestions of party and faction. If expedience therefore should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a Judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day or to apply the same decisions to different, or different decisions to the same circumstances, as his notions of expedience might dictate."

The remarks which I have grouped together under the head B are general observations on a technical and very intricate matter which has been considered in 1913-14 by the Royal Commission on Indian Finance and Currency. In their report, dated 24th February 1914, the Commissioners say:

"The system actually in operation has never been deliberately adopted as a consistent whole, nor do the authorities themselves appear always to have had a clear idea of the final object

to be attained. To a great extent this system is the result of a series of experiments."

In paras 67 and 68 the Commissioners express the following opinion:

67. "With the argument that India should be encouraged to absorb gold for the benefit of the world in general we do not propose to deal. The extent to which India should use gold must in our opinion be decided solely in accordance with India's own needs and wishes, and it appears to us to be as unjust to force gold coins into circulation in India on the ground that such action will benefit the gold using countries of the rest of the world as it would be to attempt to refuse to India facilities for obtaining gold in order to prevent what adherents of the opposite school have called the drain of gold to India. In any case these arguments (which it will be noted are mutually destructive) are irrelevant to the inquiry which we were directed to make and to the terms of reference, which confine us to a report on what is conducive to the interests of India. They raise vast controversies upon subjects which are beyond our scope, while giving no reason for the adoption of either policy, in India's own interest.

68. "We conclude therefore that it would not be to India's advantage to encourage an increased use of gold in the internal circulation."

So much for general considerations connected with the currency system. They did not apparently demand before the outbreak of the war the continuance of sovereigns as part of the Indian currency.

The learned Judge refers (para. 1 supra) to a very considerable mass of gold currency being thrown into circulation during the war. I can find no reference to this in the recorded evidence. The learned Judge probably refers to the issue of gold for the financing of wheat stated by the Finance Minister to have been

	Rs.
1917-18	92,177,040
1918-19	18,385,740;

(see proceedings of the Legislative Council of the Governor-General of 26th February 1919). It is referred to in the narrative of the Finance Minister introducing the financial statement for 1919-20 (Cl. 15) in connexion with the silver crisis of 1918 in these words:

"Our thin line of rupees had been precariously supplemented by an issue of sovereigns in parts of India where gold is freely taken in payment for the crops; but the benefit of this expedient was transient and its continuance unjustifiable;"

also in Cl. 14 it is said:

"To coin and issue our relatively small stock of gold would have been wasteful to a degree; the premium upon the metal would have driven and did in fact drive, any coined gold out of circulation immediately; it was an emergency ration rather than a currency medium. (See pro-

ceedings of the Legislative Council of the Governor-General for 1st March 1919)."

This narrative introducing the financial statement was referred to in the argument of this appeal and I propose to refer to it again as a public document containing an authoritative statement of the financial position of the Government in 1918 when the notification of August was issued from which inferences may be drawn as to the policy of the Government in issuing it.

In Cl. 21 I find that from the beginning of 1916 silver rose greatly in value and the rupee slowly followed it:

"It was impossible to face a position in which Government would be turning out rupees at a loss and placing a permanent premium on the export of its silver currency. It thus became necessary to fix a sterling exchange value for the rupee which would ensure that our coinage would not be liable to be smuggled out of India in indefinite quantities. Accordingly, with effect from 12th April, the rate for council drafts was fixed on a basis of 1s. 6d. per rupee for immediate telegraphic transfers. . . There was believed to be a considerable accumulation of funds (in India) seeking temporary investment in India for various reasons—taxation was heavier in England than here; hopes had been entertained of a further right in exchange; money was being kept handy for post bellum developments; and there was always the uncertainty about being able to recall spare money from England with the same promptitude as in former years."

I think it is fairly obvious that with exchange rising substantially above 1s. 4d. per rupee it was to one's advantage, other things being equal, to buy sovereigns, for the holder of sovereigns could still convert each sovereign for Rs. 15 which would be worth for foreign remittances much more than 1s. 4d. each. Other things however were not equal; for the prohibition of the import of gold, for which there is always a strong demand in India, had driven that metal to premium and drove coined gold out of circulation immediately. One effect of the notification of August 1918, if it was effective, would be to practically prohibit the sale of sovereigns and give their possessors the benefit of the rise of the rupee only upon exchange of sovereigns for rupees at the treasuries: thus the gold which disappeared from circulation after the wheat purchases of 1917-18 might be brought back to the treasuries. This seems to me a possible explanation of the notification.

The evidence in the case, in my judg-

ment, throws no light on the question of public policy raised for the defence.

There is evidence of a number of contracts for the sale of sovereigns held by banks in China and Japan in 1916 and 1917, not of sovereigns in circulation in India. Such contracts were anterior to the prohibition of gold imports.

The proved contracts of 1918 were for small amounts which were all closed by cross contracts before the Vaida days.

In the judgment of the lower Court it is said;

"We find a small ring of Bombay speculators greedily bulling and bearing the gold market, some selling and some buying with no other object than either to depress or raise the value of the sovereign relatively to the rupee—some three or four million sovereigns at least appear to have been nominally bought and sold between these bulls and bears. Of course there are many cases in which buying a large quantity of sovereigns may be perfectly legitimate and even necessary in the interests of trade, but dealings of the kind I have before me certainly had no other object in view than changing the relative values of the rupee and sovereign according as the bulls or bears proved successful."

I do not find anything to support these conclusions in the recorded evidence. Out of four witnesses examined Ramdas, the plaintiff, in answer to the question "Instead of buying gold people used to buy sovereigns and melt them down into ornaments?" said:

"I don't know; I can't say. They certainly hoarded sovereigns just like gold and other precious stones and metals. The piecegoods merchants made large profits as they bought sovereigns and stored them."

Chhotalal, when asked "What did your master want all these sovereigns for?" (i. e., those imported from China and Japan) said:

"The people in the bazaar wanted them, so we bought and sold to them. How can I say for what the people in the bazaar wanted them? I have never seen any sovereigns broken up and melted."

Narandas, to the question: "People buy them, break them up or melt them?" said: "How can I possibly know that?"

P. M. Dalal, while admitting that some sovereigns were broken up and melted, said purchased sovereigns were also used for hoarding. They needed gold after the prohibition of import and got it by buying sovereigns. The premium on gold did not affect the purchasing value of the rupee or any note. The exchange value of the rupee had in fact gone up considerably.

The conclusion must, I think, be that no clear general head of public policy

can be evolved which would justify the Court in holding the contracts in suit unlawful on that ground.

This is apparently the conclusion to which the learned Judge himself is driven when he falls back in the last part of his judgment on the notifications of June 1917 and August 1918 as indicia of what is contrary to public policy in connexion with the gold currency.

But if the case is to be decided on the notifications, the contracts must be shown to be forbidden by law and would then fall under the first head of S. 23, Contract Act, and any reference to public policy would be irrelevant.

I have already stated why, in my opinion, the contracts are not obnoxious to the notification of June 1917 and why they are untouched by the notification of August 1918.

These notifications were, so far as I can judge, emergency measures: the first aimed at the prevention of melting or other misuse of current gold coins; the second was perhaps devised to tempt back hoarded gold coins to the treasuries.

We set aside the decree and pass a decree for the plaintiffs for Rs. 6,755.13.0 with interest from 1st July 1918 to this date. Costs and interest on judgment at 6 per cent.

Hayward, J.—I concur, but desire to add some remarks on the general proposition.

The Coinage Act 3, of 1906, made gold coins legal tender at the rate of Rs. 15 to the sovereign. But it did not prohibit their use otherwise than as currency. The Defence of India Act Notification of the 29th June 1917 prohibited their use otherwise than as currency. The parties to these proceedings entered into transactions for the sale and purchase of gold sovereigns not at currency but at bullion rates for deliveries in May and June 1918. The Defence of India Act Notification of 22nd August 1918 prohibited sales and purchases of sovereigns at mere bullion rates. The substantial dispute between the parties was whether their transactions were thus void as contrary to law and public policy within the meaning of S. 23, Contract Act.

It was conceded by the learned Judge at the trial that the transactions were not void as contrary to law, as the evidence did not establish any intention to

use the sovereigns otherwise than as currency contrary to the notification of the 29th June 1917, and as they took place before the notification of the 22nd August 1918 making the sales and purchases of sovereigns at mere bullion rates unlawful. But it was held that the transactions were void as contrary to public policy as deducible from the subsequent notification of the 22nd August 1918, which, it was held, rendered unlawful "this trafficking in one branch of the currency during the great war." It was conceded by the learned Judge that the transactions would not have been void as contrary to public policy in the sense of the principles guiding public opinion as understood by English Judges and that it would be difficult "to give a convincing, logical and theoretical reason" for holding them opposed to public policy; but he did nevertheless so hold them and observed:

"that keeping our eye on the transactions with which I am dealing, there is no question of real public policy in the sense of widespread public opinion one way or the other . . . It would be absurd to suppose that the millions and millions of people, many of whom have never seen a gold coin in their lives, could possibly have any opinion one way or the other as to the policy of such conduct . . . so probably in a very peculiar case of this kind it would be difficult to get a clearer indication of what is or what is not opposed to public policy than the Government declaration on the subject. Policy might of course, be mistaken; policy might be unwise, but . . . that which is undertaken by a responsible Government is part of its policy and which cannot be criticized by the vast majority of those directly or indirectly affected by it must . . . be regarded as for the time being public policy, and acts declared by the Government as likely to frustrate the beneficial maintenance or operations of that policy would ordinarily be taken to fall within the general category of acts contrary to public policy . . . The plain truth is that in India public policy, at any rate for the present, is defined by and coincides with the measures of Government."

It has been urged before us on this appeal that the learned Judge ought to have been guided by the dicta of the English Judges, and not to have extended the law of public policy under S. 23, Contract Act, so as to comprehend all the political policies from time to time of the Government in India.

It behaves therefore to examine in some detail the dicta of the English Judges. It is true that assertions of the wide discretion vested in the judiciary to determine public policy were made by Pollock, C. B., in the leading case of

Egerton v. Earl Brownlow (3). But distinctions between the public good and political policies were drawn by Alderson and Parke, BB., who expressed the preference for leaving extensions of the law in the matter of public policy to the legislature. This case has been considered in detail by Sir Frederick Pollock at pp. 315 to 318 of the Seventh Edition of his Principles of Contract and he came to the conclusion that the final decision of the House of Lords depended not upon any extension of the law but, upon the ground that the particular limitations in the will of the Earl of Bridgewater had a manifest tendency to the prejudice of good government and the administration of public affairs and that this tendency had already been perfectly well recognized as contrary to public policy as understood by the Courts. It was said by Sir James Colville in the case of *Evanturel v. Evanturel* (4):

"that the determination of what is contrary to the so called 'policy of the law' necessarily varies from time to time . . . that the rule remains, but its application varies with the principles which for the time being guide public opinion," but Jessel, M. R., observed in the case of *Printing and Numerical Registering Company v. Sampson* (5) that:

"you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires is that . . . contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice."

It was also said by Lord Bramwell that

"Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy"

in his remarks against the extension of this branch of the law in *Mogal Steamship Company v. McGregor, Gow & Co.*, (6); and Lord Halsbury stated that

"it is inevitable that the particular case must be decided by a Judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles . . . that is, a principle of public policy recognized by the law",

when denying that a new head of public

policy could be invented by a Court in the case of *Janson v. Driefontein Consolidated Mines, Limited* (2). There is finally the dictum of Farwell, L. J., in the case of *Hyams v. Stuart King* (7) that "the doctrine of public policy is regarded nowadays as one rather for the legislature than the Courts"

It seems to me that those dicta apply with peculiar force here. The present transactions were not immoral and were not manifestly opposed to the public good or to good government. They were not proscribed by public opinion for there was no public opinion. They were at the time permitted by the Government. It was indeed impossible to give any "convincing, logical or theoretical reason" for holding them opposed to public policy. It was however felt that they amounted to "trafficking in one branch of the currency during the great war" and that they therefore must have been opposed to the public financial policy, which "might be mistaken or might be unwise" and wherein experts notoriously differ, because that trafficking was subsequently prohibited by the Government. These were surely strong reasons for applying the dicta of the English Judges and for leaving the exposition and protection of the public financial policy to the Executive Government and the legislature. There was, in my opinion, no substantial justification for holding that those dicta should be disregarded by Judges in India and that public policy should be interpreted under S. 23, Contract Act, as comprehending all the political policies from time to time of the Government of India.

G.P./R.K.

Appeal accepted.

(7) [1903] 2 K. B. 696=77 L. J. K. B. 794=99 L. T. 424=24 T. L. R. 675.

A. I. R. 1920 Bombay 256

MACLEOD, C. J. AND HEATON, J.

Jivraj Baloo Spinning and Weaving Co., Ltd.—Appellants.

v.

Champsey Bhara and Co.—Respondents.

Original Civil Appeal No. 29 of 1919, Decided on 29th July 1919, from decision of Pratt, J.

(a) Arbitration—Award can be set aside for error of law—What is error of law is pointed out.

A Court will set aside an award if there is an error of law patent on the face of it.

(2) [1853] 4 H. L. Cas. 1=23 L. J. Ch. 348=18 Jur. 71=94 R. R. 1=St. Tr. (n.s.) 196=10 E. R. 359.

(4) [1874] 6 P. C. 1=48 L. J. (P. C.) 58=31 L. T. 105=23 W. R. 32 (P. C.).

(5) [1875] 19 Eq. 462=44 L. J. Ch. 705=32 L. T. 351=23 W. R. 463.

(6) [1892] A. C. 25=61 L. J. Q. B. 295=66 L. T. 1=40 W. R. 337=7 Asp. M. C. 120=56 J. P. 101.

Where a rule binding on the parties to an arbitration lays down that in no case is a particular party liable to pay a sum of money as damages or compensation, then an award directing that party to pay a sum of money is bad on the face of it in point of law. [P 258 C 1, 2]

(b) **Bombay Cotton Trade Association Rules, R. 52**—Buyer refusing cotton on non-approval of tender has two options open and is not liable for damage for non exercise of either option.

Under R. 52, Rules of the Bombay Cotton Trade Association where a buyer refuses the cotton on account of non-approval of tender, he may exercise either of two, options viz., he may buy in the market at a reasonable rate on the account, risk and expense of the seller or he may invoice the cotton back to the seller at the market rate of the day, upon which the final award is made but he is not bound to exercise either of these opinions, and the failure to exercise either of these options does not render him liable to pay damages to the seller. [P 258 C 2]

(c) **Civil P. C. (5 of 1908), Sch. 2, Para. 15**—Award imposing liability not provided by contract—Award can be set aside.

Where an award imposes a liability on a party which cannot possibly be said to have been provided for by the contract between the parties on a proper construction of its terms, there is an error of law patent upon the face of the award which entitles the Court to set it aside.

[P 259 C 1]

Per *Heaton, J.*—Where an award imports by reference the contract rules and correspondence between the parties and then contravenes one of the rules, it can properly be said that there is an error of law patent on the face of the award.

[P 259 C 1, 2]

(d) **Contract Act (9 of 1872), S. 80**—Buyer rightly rejecting goods cannot be liable for damages.

It is entirely opposed to the general provisions of the Contract Act and to the Common law that a buyer who has rightly rejected goods tendered under a contract of purchase and sale should be in any way liable to the seller.

[P 259 C 1]

Kanga and Desai—for Appellants.

Setalvad and Captain—for Respondents.

Macleod, C. J.—This is an appeal from the decision of Pratt, J.

The appellants, the Jivraj Balco Spinning and Weaving, Co. Ltd., filed a petition to set aside an award in favour of the respondents. Messrs. Champsey Bhara & Co., which had been made in the following circumstances.

On 17th August 1918 the respondents contracted to sell to the appellants 100 bales New Machine Ginned Fully Good Mundra Cotton at Rs. 905 a candy, delivery 1st October to 25th November.

On 4th September 1918, a similar contract was made for the sale of 100 bales at Rs. 950 a candy. Both the said contracts were subject to the Rules and Re-

gulations of the Bombay Cotton Trade Association, Ltd.

Against the said contracts the respondents tendered cotton. Surveys were held and in each case the arbitrators made awards giving an allowance of Rs. 10-8 per candy. These awards were confirmed on appeal by the Appeal Committee. R. 52, Bombay Cotton Trade Association Rules lays down what are the buyer's rights if the tender is not approved. If the final award for inferiority of quality be in excess of Rs. 5 a candy, the buyer shall have the option either to take the cotton at the allowance fixed by the arbitrators or the Appeal Committee, or upon giving notice in writing to the seller and original tenderer to refuse the same.

Accordingly, on 25th November, the appellants gave the respondents notice that they refused the cotton tendered.

The rule then provides that if the buyer refuses the cotton he may either buy in the market at a reasonable rate on account, risk and expense of the seller or invoice it back to the seller at the market rate of the day upon which the final award shall have been made. In the event of the buyer exercising his option of invoicing the cotton back to the seller at the market rate of the day upon which the final award has been made, he shall notify his immediate seller and the original tenderer within 24 hours of the arbitration and/or appeal, if any, being finally disposed of.

The appellants did not exercise either of the options mentioned in the rule. The obvious reason was that the market had fallen.

On 29th November the respondents wrote to the appellants claiming Rupees 25,000, being the difference between the contract rates and the room rates when the cotton was rejected. The appellants replied on 30th November that the contracts were broken and therefore they were not liable to the respondents.

On 4th December the respondents wrote that they proposed to refer the matter to arbitration under the provisions of R. 13.

The appellants replied that they were not bound to refer the matter to arbitration.

At the request of the respondents the Association appointed two arbitrators under the rules to decide the alleged claim preferred by the respondents. The

appellants submitted their contentions to the arbitrators in writing.

On 23rd December the arbitrators published their award.

After reciting the contracts above mentioned the rejection of the cotton tendered, the claim of the respondents, and the denial of liability by the appellants, the arbitrators awarded and directed that the appellants should pay to the respondents the sum of Rs. 25,000.

This award was confirmed by the Appeal Board on 9th June. The appellants thereupon filed a petition to set aside the award. It was argued before the learned Judge (1) that there was no dispute which could be referred to arbitration, (2) that the arbitrators had no jurisdiction, (3) that there was an error of law patent on the face of the award. All these objections were held to be untenable and the petition was dismissed.

In the view I take of the proper construction of R. 52, a dispute could only validly arise in the event of the buyer exercising one of the options mentioned in the rule. But I think that really the first two points are involved in the third, since, if the third cannot be found in the appellants' favour, it would follow that there was a dispute which it was within the jurisdiction of the arbitrators to decide. The question whether there was an error patent on the face of the award presents many difficulties.

The rule is clear, as laid down in *Landauer v. Asser* (1), that the Court will set aside an award if there is an error of law patent on the face of it. It was contended that the arbitrators having given no reasons for their award, the error of law which it is said they have committed is a matter of speculation only, so that it cannot be patent on the face of the award.

But the arbitrators have recited the contracts which include the rules of the Association, the rejection of the cotton tendered, and the reasons for such rejection and the claim of the respondents, and it seems perfectly obvious from their award that they have allowed the claim made by the respondents in their letter of 29th November, based on their construction of the provisions of R. 52.

If then it is patent that the arbitrators

have wrongly construed the contracts, it seems on the authority of *Landauer v. Asser* (1) that we are entitled to set aside the award. Kennedy, J., at p. 191, after reading the terms of the award, said :

"The reasoning of the umpire, which he puts forward in the expression 'as the parties to the contract, etc., were by the terms thereof principals thereto,' is, as counsel for both parties seemed to agree, far from clear. I do not understand how in any case the facts help Messrs. Asser. But whatever this expression means it is, I think, quite clear that the umpire bases his decision that Messrs. Asser, the sellers, are, and Messrs. Landauer, the buyers, are not entitled to the sum in dispute, entirely upon the terms of the contract of 3rd November 1903."

I think it may be said, to use the language of Kennedy, J., that the arbitrators in this case have based their decision that the respondents are entitled to the sum they claim entirely upon the terms of the contract.

Now if it is clear that in no case under R. 52 can the buyer be liable to pay a sum of money as damages or compensation or whatever else it may be called to the seller after he has rightly rejected the cotton, then it seems to me that an award directing him to pay in such a case a certain sum of money is bad on the face of it in point of law.

What are the buyer's rights if he rejects the cotton? (1) He may buy in the market at a reasonable rate on account, risk and expense of the seller. That is to say, if the market has gone up and he buys he can call upon the seller to pay the difference. If the market has gone down and he buys, it is obvious he has no claim against the seller, but the seller has certainly no claim on the buyer for the saving the buyer has effected. (2) The buyer may invoice the cotton back to the seller at the market rate of the day upon which the final award has been made. This he could only do if the market had risen. There is no compulsion upon him to invoice the cotton back to the seller if the market has fallen. These two options are the usual ones given to a buyer as a foundation for a claim against his seller for damages (compare Rr. 37, 38 and 47); and no man in his senses would exercise either of them unless the market had risen. If the market falls, he has no claim against the seller and he can either buy or not as he chooses. The argument that the word "may" must be read "shall" is based on an obvious misreading of the rule. The

(1) [1905] 2 K. B. 184=74 L. J. K. B. 659=53 W. R. 534=93 L. T. 20=10 Com. Cas. 265=21 T. L. R. 429.

marginal note shows that para. 1 of the rule deals only with the buyer's rights if the tender is not approved. It is entirely opposed to the general provisions of the Contract Act and to the Common law that a buyer who has rightly rejected goods tendered under a contract of purchase and sale should be in any way liable to the seller. If the members of the Association think that there should be such a liability, then they must provide for it by express conditions in the contract.

I am aware that my opinion is contrary to the view of the arbitrators and the members of the Board of appeal who were persons of great experience in the cotton trade, but as they have imposed, as I think they have done, a liability on the buyer which cannot possibly be said to have been provided for by the contract on a proper construction of its terms, I think there is an error of law patent upon the face of the award which entitles the Court to set it aside.

The appellants must have their costs in both Courts.

As the appellants have paid the sum awarded they will be entitled to a refund and interest at 6 per cent from the date of payment.

Heaton, J.—It is to me quite plain from the facts stated in the judgment of my Lord the Chief Justice that no Court of law would allow damages or compensation to the seller in this case. He broke the contract by tendering goods of a quality such that the buyer was entitled to reject them and did so. It is directly contrary to law that the person who breaks the contract should receive damages or compensation for the breach. Undoubtedly therefore there is an error of law and it is so startling, so fundamental, that it becomes plainly apparent as soon as the award and the papers recited in the award are read. This is so because from the admitted facts and the contract and the rules, both of which are recited in the award, it is apparent that the buyer rightly and not wrongly rejected the goods. I have added this brief statement to the judgment of my Lord the Chief Justice with which I agree, because at first it seemed to me doubtful whether the error could be described as apparent on the face of the award. But as the award imports by reference the contract, the rules, and the correspondence between the parties, it may, I think

properly be said that the error of law is apparent on the face of the award.

I agree that the appeal should be allowed.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 259

MACLEOD, C. J. AND HEATON, J.

Dolatsangji Surajmalji Darbar—Plaintiff—Appellant.

v.

Bawabhai Damabhai Desai—Defendant—Respondent.

Second Appeal No. 433 of 1917, Decided on 9th October 1919, from decision of Joint Judge, Ahmedabad, in Appeal No. 228 of 1918.

Bombay Village Police Act (8 of 1867)—Construction of Act is primarily question of evidence whether non-vatandar village servants can or cannot be appointed.

The construction of the Bombay Village Police Act is primarily a question of evidence as to whether the organization to which it relates excludes or includes the appointment of non-vatandar village servants. [P 260 C 2]

G. S. Rao—for Appellant.

Setalvad and *G. N. Thakor*—for Respondent.

Judgment.—The case we are dealing with relates to one of those talukdari villages in the Ahmedabad Collectorate which form a part of the estate of the Patri Darbar, and I gather from the judgments that the Patri Darbar is the talukdar of this particular village, the name of which is Kamijla. It seems that in the year 1907, the police authorities came to the conclusion that the village establishment of this village of Kamijla was insufficient for police purposes, and that two pagis ought to be added to that establishment. After correspondence, which it seems has been destroyed, but of which we have evidence in the Barnishi of the Government offices, the Patri Darbar did appoint two pagis for this village and has since paid them at the rate of Rs. 5 a month each. The Patri Darbar is the plaintiff in this case. The defendant is the person who receives an 8 annas share of the revenues of the village, but it seems he has never paid any portion of the cost of these two pagis, and the plaintiff wishes to recover from the defendant half their cost. This claim opens up a very wide field of dispute, and there are a great many matters which seem to me to be matters of great difficulty about which I do not propose to say anything at all in this judgment,

because the Court of first appeal, the Joint Judge of Ahmedabad, has wrongly disposed of the matter on a preliminary point. So the appeal will have to go back to be reheard *de novo* and decided on its merits.

The original Court decided in favour of the plaintiff and the defendant appealed. The Judge in appeal was led to suppose that unless it was shown that the District Magistrate had power to appoint pagis in villages of this kind, the plaintiff's claim must fail. He found that the District Magistrate had not such power and consequently he allowed the appeal and dismissed the suit.

It may be that the Judge was quite right in his assumption that if it was shown that the District Magistrate had not power to appoint pagis, then the plaintiff's claim must fail. I do not however at present quite follow why this is so; and I am unable to agree with the Joint Judge that this is shown. The case was dealt with as if the Village Police Act (Bombay Act 8 of 1867) was the law which governed the matter, and I will take it on that basis; although incidentally, I may mention that I am not at all certain that the correct law is not to be found in the Gujrat Talukdars Act (Bombay Act 6 of 1888), particularly Ss. 5 and 30 of that Act.

However I will now revert to the basis on which the matter is dealt with in the lower Court. The Joint Judge came to the conclusion, on a perusal of Bombay Act 8 of 1867, that it was clear that the District Magistrate had no power to appoint pagis. The argument very briefly is as follows: The Village Police Act provides for the administration of village police. It provides specifically for the appointment of patils. It recognizes the existence of a village establishment or village servants, and this village establishment is by S. 9 placed under the control of the police patil for the performance of police duties. It is argued that because there is no specific provision for the appointment of what is called the village establishment, that no appointments to the village establishment are provided for by the Act. As regards vatandar village servants undoubtedly this is correct. The appointment of vatandar village servants is provided for by the Hereditary Offices Act. Whether the Village Police Act contemplates appoint-

ments of nonvatandars to the village establishment is a matter which could only be determined, it seems to me, by reading the Act itself in the light of a knowledge of the organization with which the Act is intended to deal. It seems to me to be as futile to attempt to construe this Act 8 of 1867 without some knowledge of the organization to which it relates, as it would be to attempt to construe an Act, we will say, relating to electricity, without some knowledge of electricity.

It is quite conceivable of course that the organization to which this Bombay Act 8 of 1867 relates is an organization which excludes the appointment to the village establishment of any nonvatandar village servants. If that were so, if the organization as it existed was an organization of that kind, an organization to which additions in the shape of nonvatandar village servants were prohibited, then no doubt the Act would be read, and rightly read, as conferring no power, indeed as excluding the power of appointment of village servants of that kind. But if as a fact the organization did contemplate, and did in practice comprise the appointment of nonvatandar village servants, we will say for the sake of example, by the District Magistrate, then I should unhesitatingly construe the Act as not excluding, but as contemplating, such appointments; for that would come under the head of the administration of the organization. It is therefore primarily a question of evidence as to whether the organization did exclude or did include the appointment of village servants of this kind, that is, nonvatandar village servants.

The Joint Judge has not dealt with it as a matter of evidence. The only evidence relating to the point which has been brought to our notice is a Resolution of the Government, Ex. 387. This resolution contains a letter by one of the Commissioners to Government, from which it appears that the appointments of nonvatandar village servants were undoubtedly made. The only point which at that time seems to have excited doubt was whether, when such appointments were made for police purposes, they should be made by the District Superintendent of Police or by the District Magistrate. Therefore such evidence as there is does indicate that the organiza-

tion of the village was an organization which included the appointment of non-vatandar village servants. Therefore it seems to me that the decision of the Joint Judge was wrong. I cannot accept his interpretation of the Village Police Act, because it is not shown that the organization to which that Act relates is an organization of the kind which the Joint Judge assumed. Such evidence as there is indicates that it was not an organization of that kind. Therefore it seems to me inevitable that the decision of the Joint Judge must be set aside as having been arrived at erroneously on a preliminary point, and that the appeal must be remanded to be dealt with anew. The costs of both Courts will be costs in the appeal.

G.P./R.K.

*Case remanded.***A. I. R. 1920 Bombay 261**

MACLEOD, C. J. AND HEATON, J.

Vyasacharya Madhavacharya Ghalsasi
—Plaintiff—Appellant.

v.

Vishnu Vithal Kulkarni—Defendant—Respondent.

Second Appeal No. 115 of 1918, Decided on 19th November 1919, from decision of Asst. Judge, Satara, in Appeal No. 256 of 1916.

(a) Bombay Land Revenue Code (5 of 1879), S. 83—Presumption under S. 83 arises when origin of tenancy is unknown—Person in possession is permanent tenant and not Mirasi.

Where the origin of a tenancy cannot be ascertained and no satisfactory evidence of its commencement is forthcoming, the presumption allowed by S. 83 arises, and the person in occupation must be taken to be a permanent tenant but not a Mirasi tenant. [P 261 O 2]

(b) Landlord and Tenant—Rent—Rent of permanent tenant can be enhanced up to three times rent.

In the case of a permanent tenant, not an occupancy tenant, the landlord has the right by usage to enhance the rent and an enhancement to the extent of three times the assessment is not unreasonable. [P 262 O 1]

A. G. Desai—for Appellant.

M. V. Bhat—for Respondents.

Macleod, C. J.—The plaintiff sued to recover possession of the plaint lands together with Rs. 2-0-6 for past damages and costs, alleging that the plaint properties were of his ancestral Inami and Mirasi rights, that the lands were let to defendant on an annual oral tenancy, that the defendant did not pay rent regularly, and that defendant was called

upon to pay enhanced rent, but he refused. The plaintiff prayed that in case actual possession could not be allowed to be given, then in the alternative enhanced rent at Rs. 30 per year should be given.

The trial Court allowed the claim. In appeal the decree was reversed and enhancement was awarded at the rate of the assessment fixed by the Revision Survey. The learned Judge expressed the opinion that if he was wrong on the question of enhancement, the maximum enhancement should be three times the assessment.

Now the title of the plaintiff is perfectly clear. It is based on a sanad granted in 1727 by King Shahu Chatrapati of Satara to Narsinhacharya Bin Narsinhachabhat of 20 bighas. The said Narsinhacharya then made a gift of 10 bighas in favour of plaintiff's ancestor Narayanacharya Bin Madhavacharya about 1730, and thereafter at the request of the donee, an order (Ex. 63) was issued by which the gift to Narayanacharya was recognized, and it was ordered that the 10 bighas should be continued in Inam to the said Narayanacharya and his heirs. It is quite clear from the wording of Ex. 63 that what was granted was the soil and not merely the royal share of the revenue. The defendants admittedly are tenants in occupation of the land, and it has been found by both Courts that the origin of the tenancy cannot be ascertained and no satisfactory evidence of its commencement is forthcoming. Therefore the presumption allowed by S. 83, Bombay Land Revenue Code arises, and defendants must be taken to be permanent tenants. But it does not follow from that that they are Mirasi tenants. S. 83 says nothing whatever about Mirasi tenure. Therefore if the defendants are permanent tenants they are subject to the saving Clause in S. 83 which says:

"Nothing contained in this section shall affect the right of the landlord (if he have the same either by virtue of agreement, usage or otherwise) to enhance the rent payable or services renderable, by the tenant"

It cannot be disputed that the landlord has in the case of a permanent tenant, not an occupancy tenant, the right by usage to enhance the rent. It seems to have been the opinion of the lower appellate Court that there had been an alienation in this case of a de-

finite share of the village, so that S. 216 taken together with S. 217 of Bombay Land Revenue Code applied. But the phrase "a definite share of the revenue of a village" or "the definite share of a village" is perfectly well known in these Courts, and it cannot be said that a grant of 20 bighas or 10 bighas out of the cultivated area of a village can be construed as a grant of a definite share of a village. The result is the only section that applies is S. 83. Therefore the plaintiff in this case has a right to enhance to a reasonable extent. It is not disputed that the enhancement which the lower appellate Judge considered reasonable, namely three times the assessment, is unreasonable. Therefore in my opinion the order of the lower appellate Court in this and the companion appeals must be modified and the plaintiff will be entitled in each suit to a declaration that he is entitled to recover enhanced rent at the rate of three times the assessment. The appellant will be entitled to the costs of this and the companion appeals Nos. 134 to 137 of 1918.

Heaton, J.—We are dealing here with land in a surveyed unalienated village. The land was originally granted to the plaintiff's predecessors very many years ago, and has now become 5 survey numbers in this surveyed unalienated village. I gather from the judgments of the Court below that these survey numbers are entered in the name of the plaintiff who is the holder, and who holds on special terms, but they are cultivated by other persons. The plaintiff claims that those other persons are his tenants. He said that they were annual tenants. But at any rate he claims that they are tenants and that as such he has a right to demand increased rent from them. They reply that they are Mirasdars and that the plaintiff was entitled only to receive the fixed assessment or Akar on the land. In this appeal we are really only concerned with this question: whether the plaintiff is entitled to receive only the assessment, or whether he is entitled to demand more. The lower appellate Court held that the plaintiff was entitled only to receive the assessment, and the plaintiff has now appealed to this Court. I am unfortunately unable to follow the reasoning of the lower appellate Court. But I think at any rate his judgment displays some confusion in the use of the

word 'Mirasdar'. The word is used in two senses. It is used as I think somewhat incorrectly, to mean a permanent tenant. It is also used, as I think correctly, to mean a person who has the occupancy rights of land, that is to say, who is an occupant and not a tenant. If these two meanings are kept quite clear, it does not perhaps greatly matter that you use the word 'Mirasdar' meaning a 'tenant' provided that you realise when you are so using it that you are speaking of a tenant. Now in this case it has not been found, and I do not suppose it could be found, on the materials in the case that the defendants are Mirasdars in the sense that they have rights of occupancy, and are not tenants. I will here refer for a moment to the word 'occupant' as defined in the Land Revenue Code: which is, that it means a holder in actual possession of unalienated land, other than a tenant. That is to say an 'occupant' is not a 'tenant'. He has higher rights than a tenant, and there are occupants with such rights even of alienated lands. But the finding in this case is merely that the defendants are permanent tenants, a conclusion that is reached by applying S. 83. Now that conclusion as a finding cannot, I think, be challenged in second appeal. But if it were challenged, the answer would certainly be very easy. The facts as disclosed by the judgments of the lower Courts show absolutely conclusively that no satisfactory evidence is forthcoming of the commencement of the tenancy. There is a tenancy, but when it began or how it began we do not know, and cannot ascertain because of the length of time that has passed since its beginning. That is precisely the case to which S. 83 of Land Revenue Code applies, and there can, I think, be no doubt the lower Courts correctly arrived at the conclusion that the defendants were permanent tenants.

But I think the lower appellate Court was wrong in the legal inferences that it drew from that position. S. 83 specifically provides that the rent can be enhanced by the landlord, if he has that right either by virtue of agreement, usage or otherwise. No doubt the landlord cannot plead that he has the right by virtue of agreement, but the usage is very widely known and well understood. Permanent tenants who have not the

rights of occupancy are liable to have their rent enhanced by their landlords. I think therefore that the decree of the lower appellate Court must be modified by allowing that enhancement of rent which it finds would be appropriate to the case, that is a total of Rs. 111-0-0. which is three times the assessment of the entire survey number. That will have to be split up proportionately amongst the respondents in these five appeals.

G.P./R.K.

*Decree modified.***A. I. R. 1920 Bombay 263**

MACLEOD, C. J. AND HEATON, J.

Rustam Sorabji Powwalla and others—
Plaintiffs.

v.

*Ramchandra Balaji Gaikwar—*Defendant.

Reference, Decided on 20th November 1919 from Small Causes, Judge, Bombay, in Suit No. 16305 of 1919.

Bombay Rent Act (2 of 1918), S. 9 (2)—Under S. 9 it is not necessary that landlord must erect building—Third person doing under an arrangement with landlord suffices.

Clause (2), S. 9, does not require either expressly or by implication that the building must be erected by the landlord. The idea is that a building is to be erected but the words do not suggest that if a building is to be erected by some person other than the landlord, under some arrangement with the landlord, that then the landlord is prohibited from requiring the tenant to leave the premises. [P 264 C 1]

*Taraporevala—*for Plaintiffs.*Kanga—*for Defendant.

Macleod, C. J.—This was a suit filed under Ch. 7, Presidency Small Cause Courts Act by the three plaintiffs to recover possession of certain premises from the defendant. The first two plaintiffs were the owners of the property and the landlords of the defendant. They had agreed to give a lease to plaintiff 3 for a period of 999 years, under which plaintiff 3 covenanted to erect certain buildings on the land. The land admittedly, as it stands at present contains buildings of a very inferior character, and plaintiff 3 has undertaken to erect pucca buildings provided with all modern conveniences which undoubtedly will much improve the property and provide accommodation for more persons than are able to be accommodated in the present buildings.

The defendant resisted the suit on the ground that he was protected by S. 9, Cl. (2), Act 2 of 1918. He contended that

the premises must be required by the landlord for the erection of buildings by the landlord only, and not by any third party to whom the landlord may have leased or sold the premises. I do not think that is the proper construction to be placed upon the Act. Otherwise a landlord owning undeveloped property within the limits of the city would be prevented entirely from developing his property and providing further accommodation for the inhabitants of the city, if he had not got the requisite capital for the new buildings. I think it can be said that the landlord has leased his premises admittedly with the object of improving the existing accommodation by raising new buildings. It is clear that he has required the premises for the erection of buildings. As a matter of fact the point taken by the defendant is purely a technical one, because if the landlord had actually sold his premises, or leased them on a building lease of this nature to a third party and given possession, it is obvious that the new landlord would be entitled to give notice, and the tenants would not be protected by S. 9, Cl. (2) of the Act. But in this case the foundation for any technical objection of that sort disappears, because plaintiff 3 who may be considered as the lessee of the premises under the building lease, is a party to the proceedings. So that since he can be considered as the landlord, and it is quite clear that he requires the premises for the erection of buildings, the present tenants are not protected unless his conduct is unreasonable.

The learned Judge has also referred the following question:—Is the requisition by the landlord reasonable under the circumstances? That is purely a question of fact. The Judge must come to a conclusion on the facts of the case, and it is impossible for us to lay down any general principle which should guide a Judge in coming to a decision on the facts of the case before him whether the conduct of the landlord is reasonable or not. Costs costs in the cause.

Heaton, J.—I must assume for the purpose of this reference that the premises are reasonably and bona fide required. That of course is a question of fact which we cannot determine, and which the Small Cause Court Judge must determine. But assuming that it is so,

that the premises are reasonably and bona fide required, then we know that they are required for the erection of buildings.

The only point that remains is to consider whether the words of Cl. (2) of S. 9 Act 2 of 1918 require, either expressly or by implication, that the building must be erected by the landlord. It seems to me, that this is not expressed in the section and not implied by the words used. The idea is that a building is to be erected, but I do not think that the words suggest that if a building is erected by some person other than a landlord, under some arrangement with the landlord, as is proposed in this case that then the landlord is prohibited from requiring the tenant to leave the premises. Therefore I think the reference should be answered as proposed.

G.P./R.K. *Reference answered.*

*** A. I. R. 1920 Bombay 264**

MACLEOD, C. J. AND HEATON, J.

Desaiappa Khalilappa Desai — Plaintiff—Appellant.

v.

Dundappa Malkappa — Defendant — Respondent.

Second Appeal No. 212 of 1918, Decided on 4th September 1919, from decision of Dist. Judge, Bijapur, in Appeal No. 159 of 1916.

*** Limitation Act (9 of 1908), Art. 182—Previous execution barred by time but allowed and not objected—Subsequent execution application cannot be objected to as barred — Execution.**

Where an application for execution which is barred by time is admitted by the executing Court and execution is ordered to issue thereon, the order although erroneously made is nevertheless valid, unless reversed upon appeal, and the judgment-debtor cannot object to a subsequent application for execution on the ground that the previous application was barred by time. [P 264 C 2]

Y. N. Nadkarni—for Appellant.

H. B. Gumaste—for Respondent.

Judgment.—In this case a decree was passed on 18th February 1899 for Rs. 376 and costs in favour of the plaintiff. The first darkhast presented to the Court was dismissed for nonproduction of a succession certificate on 20th March 1907. Thereafter a darkhast was filed on 31st March 1910, which was disposed of on 8th September 1910, and then another darkhast was presented on 12th September 1910. The defendant then appeared and contended that the dar-

khist of 31st March 1910 was barred. Apparently the Court decided that the darkhast of 12th September 1910 was in time, and directed that the money due should be paid by instalments, the first instalment to be paid on 15th April 1912. On 26th March 1913 Rs. 220 were paid to plaintiff. The present darkhast was filed on 19th November 1915 to recover the balance due under the decree of Rs. 270-3-6.

The first Court directed execution to proceed. The lower appellate Court reversed the order of the lower Court, and dismissed the darkhast with costs, on the ground, as I take it, that the decree was dead on 31st March 1910, and even although the further darkhast was admitted thereafter, that would not have the effect of reviving the decree, so that the Court was entitled to consider the question in the present darkhast, and come to the conclusion that no darkhast ought to have been admitted after 31st March 1910. But we have been referred by the appellant's pleader to the case of *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry* (1), which was a case very similar to the present case. There a decree was passed in 1851, and thereafter there were many applications and proceedings to enforce or keep in force the decree. An application was admitted on 5th September 1874, although the previous application was dated 7th August 1871, and therefore the last application was admittedly more than three years after the previous one. It was held by the lower Court that a decree once dead no proceedings by means of an application out of time could revive it, but their Lordships of the Privy Council considered that that was not a correct argument, and held that the order, although it may have been erroneously made, was nevertheless valid, unless reversed upon appeal. The result is that we must consider the order made on the darkhast of 12th September 1910 as valid, as it was not reversed on appeal and therefore the present darkhast is within time, as the last instalment was paid by the defendant on 26th March 1913. We therefore reverse the decree of the lower appellate Court and restore that of the trial Court, and direct that execution do proceed as prayed for. The

(1) [1882] 8 Cal. 51=8 I.A. 123=4 Sar. 248 (P.O.).

respondent must pay the costs of the darkhast throughout.

G.P./R.K.

Decree reversed.

A. I. R. 1920 Bombay 265

MACLEOD, C. J. AND HEATON, J.

Kooverbai Sorabji Manekji—Appellant.
v.

Assistant Collector, Surat—Respondent.

First Appeal No. 274 of 1917, Decided on 8th March 1920, from decision of Dist. Judge, Surat, in Reference No. 5 of 1914.

Land Acquisition Act (1 of 1894), Ss. 11 and 12—When award becomes final stated—Mere signing does not but filing does make it final.

An award made by a Collector in land acquisition proceedings becomes final and binding only when it is filed under S. 12; the mere signing of the award by the Collector does not make it conclusive. Before filing an award it is open to the Collector to destroy one which he has already signed and to substitute another in its place. [P 266 C 1]

K. N. Koyajee—for Appellant.

S. S. Patakar—for Respondent.

Macleod, C. J.—This is an appeal from a judgment of the District Judge of Surat in Reference No. 5 of 1914. The land acquired was notified by Government in June 1912 on behalf of the B. B. & C. I. Ry. Co. The award under S. 11, Land Acquisition Act by the officer appointed by Government amounted to Rs. 70 per Guntha, the area to be acquired being one acre and one Guntha. The learned District Judge came to the conclusion that the market value of the ground was Rs. 60 per Guntha. He allowed Rs. 369 damages for severance. The total being under the Collector's award, the Collector's award stood.

The first point taken before us was that the first Acquisition Officer, Mr. Sedgwick, made an award which was binding on the Government, amounting to Rupees 132 per Guntha. That award was never communicated to the parties. The claimant never knew that Mr. Sedgwick had formed an opinion that the land was worth Rs. 132 a Guntha, until Mr. Sedgwick was called in the case as a witness and cross-examined.

The appellants now rely upon the decision in *Dosabhai Bezanji v. Special Officer, Salsette Building Sites* (1). What happened in that case was that the Collector made an award in the following form :

"Government in their Memorandum No. 10578, R. D. of 17th October 1908, have directed me to award compensation at the rate of Rs. 4 per acre for khajan land and Rs. 120 per acre for kharif land, and I therefore make my award accordingly."

The Court held it was not competent to Government to direct the Collector to substitute a smaller amount than that which, as the result of his inquiry, he had determined to offer.

I gather from the judgment of Heaton, J. that he concurred with the judgment of Batchelor, J. to this extent that the award stated the sum which, according to the opinion of another authority altogether, was the compensation which should be awarded, and, so far as could be judged from the terms of Mr. Waterfield's order, it was a sum which he would never himself have offered as compensation, and which in his judgment was strikingly inadequate. Therefore Heaton, J. thought it was quite impossible to hold that an award in that form was an award made by a Special Acquisition Officer.

As appears from his judgment, Batchelor, J. went somewhat further than that, because at p. 604 (of 36 Bom.) the learned Judge says :

"Then it was suggested that the order of Mr. Waterfield's proposing to award Rs. 50 per acre was not award but was a mere proposal for an award. It seems to me that this argument comes with a certain want of grace from the representative of Government, since if the order fell short of being an award, it fell short only by reason of those very executive orders of the Government whose validity is now in dispute. And if I am right in thinking that those orders are of no effect, then it follows that the award is that which Mr. Waterfield would have made had he not been restrained by these orders."

— So that the learned Judge seemed to be of the opinion that, when an Acquisition Officer had come to the conclusion as to what should be awarded for a particular piece of land to be acquired, and had recorded his reasons in writing for the conclusions he had come to as to the value of the land, though, under special orders of Government, he had referred the matter of compensation to his superior officers, the Special Acquisition Officer had already made an award which was binding on Government, and if its contents could be proved, the claimant would be entitled to get that amount and nothing less in the first

instance, while he could get more by an application to the Court.

If that had been the opinion of both the learned Judges in that case, then it would be binding on me. But my learned brother tells me that he did not agree with that opinion which was expressed by Batchelor, J. but merely agreed with the conclusion arrived at that the award in that case, in form in which it had been promulgated, was not an award by the Collector as was intended by S. 11, Land Acquisition Act. He did not agree with the opinion expressed by Batchelor, J. that as soon as the Collector had reduced his reasons to writing and signed them, there was an award which could not be altered, and that certainly is not my opinion either.

Section 12 of the Act appears to me to make it clear when an award becomes an award which is conclusive and binding on Government. First, the Collector makes, under S. 11, an award under his hand. It cannot be, in my opinion, the case that as soon as he has signed the document that then it becomes conclusive. He can tear it up and substitute another if he pleases. But under S. 12, the award shall be filed in the Collector's office, and shall, except as thereafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested. Then, under sub-S. (2) :

"The Collector shall give immediate notice of his award to such of the persons interested as are not present personally or by their representatives when the award is made."

Therefore it is the filing of the award in the Collector's office which makes it final and conclusive as against the parties interested. It is not suggested in this case that the award of Mr. Sedgwick had been filed in the Collector's office. The claimant has had to rely merely on the fact that he did sign what purported to be an award, and then asked for instructions from his superiors as to what should be done. Therefore I think the learned Judge in this case was correct in declining to be bound by the opinion expressed by Mr. Sedgwick with regard to the amount of compensation to be awarded.

The only question remaining is whether the District Judge's decision declining to interfere with the amount awarded by Mr. Parekhji, who made a final award on behalf of Government, should be disturbed. Mr. Parekhji allowed Rs. 70 a guntha, Mr. Murphy, Rs. 60 plus compensation for severance. The latter depends for his valuation on the amount realized by the owner under the leases which were signed by his tenant Ardeshir. It seems that the rent was increased by Rs. 50 per cent about April 1912 very shortly before the land was notified for acquisition, and that the parties were aware that the railway company were about to apply to Government that acquisition proceedings should be taken, is clear from the terms of the document itself.

If I thought that the learned Judge had based his valuation on any wrong method, or that in any respect his figures were erroneous then it might possibly be held that he has undervalued the property. But as far as I can see, there is no clear error in the judgment. Then an appellate Court, in my opinion, should not be prone to upset the judgment in the matter of a valuation by the lower Court which has heard the evidence, unless the Judge has fallen into an obvious error in coming to his conclusions. It is quite possible that one Judge might allow a few rupees more here or there than another Judge. But it is not the function of an appellate Court to interfere in such a case. The claimant has been awarded Rs. 2,400 an acre for his land. Considering all the circumstances of the case, I should say that is a fair value. In my opinion therefore the appeal fails and should be dismissed with costs.

Heaton, J.—On the merits of the case that is to say, the market value of the land, I have nothing to add. But I confess I was rather surprised to find it was argued that the decision in the case of *Dosabhai Bezanji v. Special Officer, Salsette Building Sites* (1) supplied us with a solution of the problem in this particular case. Here there was merely a writing signed by a person who at the time was the acquiring officer. But that writing was never given effect to. It was never promulgated. It was never apparently filed in the Collector's office even. It was submitted to Government, and before any promulgation came to be

made it was withdrawn. A different acquiring officer had taken up the affair, and it was his award based on the results of his inquiry which was promulgated, and was filed in the Collector's office and so forth. It seems to me to be perfectly clear that we have no award from the first acquiring officer. We have nothing more than what might have become an award if certain other proceedings had been taken, which in fact never were taken. This, to my mind is quite clear when we take the facts and look at them in the light of the provisions of Ss. 11 and 12, Land Acquisition Act.

What we have to deal with in this case is the award which really was made, and it was made, not by Mr. Sedgwick, the first acquiring officer, but by Mr. Parekhji who came later. Consequently, what is said in *Dosabhai Bezanji v. Special Officer, Salsette Building Sites* (1) does not seem to me to help at all. In that case we were dealing with what undoubtedly was an award, in that it fulfilled all the formalities, it had been filed had been promulgated and so forth, and we were dealing with matters which were stated in that award, and which appeared from that award. If in that case Batchelor, J., really went the length of saying, or implying that a statement of opinion which had not been filed, and which had not been promulgated, was an award then I certainly did not agree with that opinion, nor in my judgment, did I state anything which would justify the supposition that I did agree. I find nothing in my judgment in that case which I would like to vary now, and I feel no doubt that the appeal in this case ought to be dismissed with costs.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1920 Bombay 267**

MACLEOD, C. J. AND HEATON, J.

Chanbasayya Padadaya — Defendant
—Appellant.

v.

Chennapgavda Ramchandragavda Patil
—Plaintiff—Respondent.

First Appeal No. 254 of 1917, Decided on 1st August 1919, from decision of Asst. Judge, Dharwar, in Civil Suit No. 23 of 1916.

Dekkhan Agriculturists' Relief Act (17 of 1889), S. 2—Scope—Extension of Act to a district implies that not one or two sections but substantial portion must be made applicable.

The extension of the Act to a particular dis-

trict contemplated in S. 2 (1st) of the Act is the extension of the substantial portion of the Act and not merely the extension of a particular section or one or more sections. What is meant is that there must be an extension of the Act sufficient to provide that its main purpose applies to the district, or a really substantial part of the main purpose. (P 268 C 2)

D. A. Tuljapurkar—for Appellant.

R. A. Jahagirdar—for Respondent.

Macleod, C. J.—The plaintiff sued to recover possession of the plaint land and Rs. 900 as mesne profits for three years before suit from the defendant. The suit was filed in the Court of the Assistant Judge of Dharwar. The defendant sought to prove by parole evidence that the sale deed which he had admitted having executed should be construed as a mortgage. This was a defence which he could set up if he was an agriculturist at the time of the transaction which was in 1903.

It is argued that the defendant could prove he was an agriculturist within the meaning of S. 2, Dekkhan Agriculturists' Relief Act, because the Act had been extended to the District of Dharwar before the execution of the sale deed. When the Act was passed, Ss. 1, 11, 56, 60 and 62 only were extended to the whole of British India. The rest of the Act extended only to the districts of Poona, Satara, Sholapur and Ahmednagar, but might, from time to time be extended wholly or in part by the Local Government to other Districts. In 1903, Ss. 2 and 20 of the Act, were extended to Dharwar. Clearly the object of that extension was to enable agriculturists to obtain the benefit of S. 20, which enacts that the Court may at any time direct that the amount of any decree passed, whether before or after the Act comes into force, against an agriculturist, or the portion of the same which it directs under S. 19, to be paid, shall be paid by instalments with or without interest. S. 19 had been repealed, and S. 20, ought to have been amended accordingly.

It has been argued then that the defendant can prove that he was an agriculturist at the date of the execution of the sale deed, but that argument depends upon the definition of "agriculturist" which expression under S. 2 must be taken to mean

"a person who by himself or by his servants or by his tenants earns his livelihood wholly or principally by agriculture carried on within the limits of a district or part of a district to which

this Act may for the time being extend, or who ordinarily engages personally in agricultural labour within these limits."

But I do not think it can be said that the Act has been extended by the Notification of 1903 to the Dharwar District, and that therefore the defendant can now prove that he was an agriculturist at the date of the transaction, so that he can be allowed to prove by parole evidence under S. 10-A that the sale deed should be construed as a mortgage. It may have been the intention of the Local Government to enable a person resident in Dharwar to prove that he was an agriculturist in order to take advantage of S. 20. Clearly such a person could only prove that he was an agriculturist if he was earning his livelihood wholly or principally by agriculture 'carried on,' if he was a resident of Dharwar, in the Dharwar District, provided the Act had been extended to that district, and therefore it may be said that the Local Government considered that the Act had been extended to Dharwar. But we have to consider what is the plain meaning of S. 2. In my opinion it cannot be said that in 1903 the Act was extended to Dharwar merely because Ss. 2 and 20 were extended. What is meant by the extension of an Act to a District is the extension of the substantial portion of the Act, and not merely the extension of a particular section or one or more sections. Otherwise the Act would extend to the whole of British India because Ss. 1, 11, 56, 60 and 62, extend thereto. The plaintiff could only succeed if S. 2 had contained the words "district to which this Act may for the time being either wholly or in part extend." In my opinion therefore the decision of the learned Assistant Judge was correct and the appeal must be dismissed with costs.

Heaton, J.—We have in this case, as has happened so often before, to consider the meaning of the word "agriculturist." Broadly speaking, at any rate for the purposes of this Court, there are two ways of ascertaining the meaning of that word: one way is to turn to the dictionary, the other way is to turn to the Dekkhan Agriculturists' Relief Act. But the Dekkhan Agriculturists' Relief Act only provides you with an "agriculturist" if that person (broadly speaking) is residing within the limits to which the Act has been extended. The word as

used in the Act has no application whatever to cultivators and others who live outside those limits. In this particular case the person claiming to be an agriculturist lived and carried on his work in the Dharwar District and the transaction we are concerned with was of the year 1903. So we have to consider whether the Act extended to the Dharwar District in 1903. There can be no doubt that the Act cannot extend to a District because a few sections only extend. I think the Act itself provides us with good reason for saying this because it provides that S. 1 and four other sections extend to the whole of British India, and that the rest of the Act extends only to the four named districts. I do not think that would have occurred in the Act itself if the legislature had intended that the extension of these five sections would have to be regarded as an extension of the Act. I think the very contrary appears.

Then it may be said that the Act cannot extend to a district unless every single word of it extends. I do not think that applies either. I think what is meant is that there must be an extension of the Act sufficient to provide that its main purpose applies to the district, or a really substantial part of the main purpose. That happened in the Dharwar District in 1905, not in the year 1903. We have the effect of S. 10-A dealt with in the Full Bench case of *Sawantrawa Fakirappa v. Giriappa Fakirappa* (1). The result is rather curious, because S. 10-A is held to apply to transactions which were entered into after the Act is extended in a particular region, and not to apply to transactions before that time, and this has been described as very arbitrary. But for all that, there is a very good reason for it, and the reason is this. S. 10-A was enacted to meet an evil which had arisen by reason of the operation of the Dekkhan Agriculturists' Relief Act in the four districts to which for many years it had been applied, and it was feared that when the Act came to be applied to other districts the same evil might arise there also. But it did not appear that the evil which was prevalent in the four districts had at that time become at all common elsewhere. That I believe to be a cor-

(1) A. I. R. 1914 Bom. 273=21 I. C. 4=38 Bom. 18 (F. B.).

rect statement of facts so far as they were then known, and I believe so far as they are now known, and therefore it would be natural and it would exactly fulfil the intention of those who suggested S. 10-A that it should result precisely as laid down in the Full Bench decision in *Sawantrawa Fakirappa v. Giriappa Fakirappa* (1). The remedy for the evil is only to be applied after the evil comes into existence, and the evil is not likely to come into existence until the Act is extended. The result that we have arrived at in this case is absolutely in accordance with what I believe to be the intention of S. 10-A. We find that it does not apply to the transaction in this case, because that transaction happened at a period before there was any reason to suppose that the evil which S. 10-A was intended to thwart had arisen in the Dharwar District. I agree therefore that the appeal should be dismissed with costs.

G.P./R.K.

*Appeal allowed.***A. I. R. 1920 Bombay 269**

MACLEOD, C. J. AND HEATON, J.

Gurushiddswami—Defendant—Appellant.

v.

Parawa Dunadya Narendra—Plaintiff—Respondent.

First Appeal No. 256 of 1916, Decided on 21st August 1919, from decision of Sub-Judge, First Class, Dharwar, in Suit No. 325 of 1913.

Evidence Act (1 of 1872), S. 115—Minor representing as major—Other party not deceived—Minor is not estopped from setting up minority as defence—Transaction with minor set aside—Court will not ordinarily order return of consideration under Specific Relief Act (1 of 1877), S. 41.

A minor, who at the time of entering into a transaction fraudulently represents himself to be a major, is not estopped from subsequently setting up the defence of minority where the person to whom the representation is made is not deceived thereby.

Where such a transaction is set aside at the instance of the minor, the Court will not exercise its discretion under S. 41, Specific Relief Act, unless there are very strong circumstances in the case entitling the defendant to a return of the consideration. [P 269 C 2]

G. S. Rao and P. B. Shingne—for Appellant.

Jayakar and K. H. Kelkar—for Respondent.

Macleod, C. J.—The plaintiff sued to obtain a declaration that the sale-deed

passed by her on 9th March 1903 to her deceased husband's brother was not valid, and to recover possession of the property described in the plaint with mesne profits for the year 1911-12 with future mesne profits and costs. The greater part of the evidence turned upon the question whether the plaintiff was a minor when she signed the sale-deed. It cannot be disputed that she signed the sale-deed and admitted execution before the Sub-Registrar, and that it appears from the document that Rs. 2,400 was paid for the land. We have considered very carefully the evidence which was dealt with by the learned Subordinate Judge, and also the arguments adduced by Mr. Rao to show that the finding of the learned Judge was wrong, but there are many circumstances in the case which all point to the fact that the plaintiff was a minor in 1903.

The question arises whether she is now estopped because according to the defendant's case she represented herself as being a major, when she must have known that she was a minor. It has been held by a Bench of this Court that a person can be estopped in such circumstances, but it was admitted in that case that the circumstances in which an estoppel would be allowed would be extremely rare. But in this case there is evidence that the defendant was not deceived by what the plaintiff had told him. He had made inquiries about plaintiff's age from other sources and from the plaintiff's father. Beyond that the plaintiff was the widow of his deceased brother and it is not an unfair presumption to make against the defendant that he must have known perfectly well what the plaintiff's age was.

Lastly, the question arises whether under S. 41, Specific Relief Act, we should direct the plaintiff to restore the consideration money. The Court no doubt has a discretion to do so, but there must be very strong circumstances in the case to enable the Court to find that there is an equity in favour of the defendant. In the case of *Thurstan v. Nottingham Permanent Benefit Building Society* (1), referred to in *Mohori Bibee v.*

(1) [1902] 1 Oh. D. 1=71 L. J. Oh. 83=50 W. R. 179=86 L. T. 35=18 T. L. R. 135 affirmed in (1903) A. C. 6=72 L. J. Ch. 184=67 J. P. 129=51 W. R. 273=87 L. T. 529=19 T. L. R. 54.

Dharmadas Ghose (2), by their Lordships of the Privy Council and in which the judgment of Romer, L. J., is quoted, a mortgage in favour of the society was set aside, and the question was whether the society was not entitled to repayment of the advances; Romer, L. J., said:

"The short answer is, that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature has declared to be void."

Cases may arise in which the Court might come to the conclusion that there was an equity in favour of the person to be paid the money. But in this case we do not think that there is any such equity. The result must be that the appeal is dismissed and the decree of the lower Court confirmed with costs.

Heaton, J.—I concur.

G.P./R.K.

Decree confirmed.

(2) [1903] 30 Cal. 539=30 I. A. 114=8 Sar. 374 (P. C.).

*** A. I. R. 1920 Bombay 270
Full Bench**

HEATON, AG. C. J., SHAH AND
HAYWARD, JJ.

Emperor

v.

Cunna—Accused.

Criminal Confirmation Case No. 4 of 1920 and Criminal Appeal No. 61 of 1920 Decided on 21st March 1920, from conviction and sentence passed by Sess. Judge, Kanara.

(a) Evidence Act (1 of 1872), S. 24—What is confession within S. 24 stated.

Any statement made by a person which would suggest an inference as to his guilt may be a confession within the meaning of S. 24.

(b) Evidence Act (1 of 1872), S. 24—Confession recorded under inducement by police officer is inadmissible under S. 24—Criminal P. C. (5 of 1898), S. 164.

If it is found that a confession recorded by a Magistrate under S. 164, Criminal P. C. was procured by a police officer by the offer of an inducement, the confession becomes inadmissible under S. 24, Evidence Act. [P 280 C 2]

(c) Evidence Act (1 of 1872), S. 132 — There must be objection to question to be able to say that one is compelled to answer.

Unless a person objects to any question the answer to which is likely to criminate him he cannot be said to have been compelled to give such answer within the meaning of the proviso to S. 132, Evidence Act. [P 275 C 2]

(d) Evidence Act (1 of 1872), S. 24 —

S. 24 applies to person making confession but accused afterwards.

Per *Shah, J.*—S. 24 would apply even if the person who is said to have made the confession was not an accused person at the time that he made the confession. It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession.

[P 273 C 2]

* (e) Criminal P. C. (5 of 1898), S. 339 (2) — S. 339 (2) does not exclude operation of S. 24, Evidence Act—if tender of pardon is accompanied by other inducement from other source, statement of approver which amounts to confession would be rendered inadmissible by Evidence Act (1 of 1872), S. 24.

Per *Shah, J.*—Though the statements made by an approver may be given in evidence against him under sub-S. (2), S. 339, Criminal P. C., it cannot be said that the operation of S. 24, Evidence Act, is altogether excluded. Ordinarily, the inducement that would appear on the surface would be the inducement of the pardon legally tendered and accepted under the provisions of the Criminal Procedure Code. But if it is shown in any case that there was some other influence simultaneously proceeding from any other authority which would invite the application of S. 24, Evidence Act, then the confessional part of the statements would become inadmissible by virtue of the provisions of that section. [P 273 C 1]

(f) Criminal P. C. (5 of 1898), S. 339 (2) — (Per *Heaton, Ag. C. J.*) — S. 339 (2) excludes operation of S. 24, Evidence Act.

Per *Heaton, Ag. C. J.*—A statement falling within Cl. (2), S. 339, is removed from the operation of S. 24, Evidence Act. (*Hayward, J.* semble).

S. S. Patkar—for the Crown.

Y. N. Nadkarni—for Accused.

Shah, J.—It will be convenient to give a brief statement of the facts relating to this case. The accused, Cunna, and the deceased, Dev Naik, went together from Halgeri to Byadgi. The purpose of the trip was to sell the betel nuts belonging to the deceased Dev Naik. They returned from Byadgi to Halgeri on the morning of 4th January 1918. The deceased had with him nearly Rs. 400, being the proceeds of the sale of his betel nuts; and this fact was known to the accused. The deceased went in the afternoon of that day to Husur, an adjoining village, and returned in the evening back to the house of Cunna. The deceased left the house of the accused during the night for his native place Hukli, and on the way from Halgeri to Hukli he was murdered on the night of 4th/5th January 1918. The news of his death was received on Sunday 6th January. His body was found with a number of wounds, but the money was not found. A report was sent by the police patel.

But that report was sent back for an entirely unsatisfactory reason. A second report was sent on the 7th, and the Sub-Inspector, Malhar Bhatt, arrived on the 7th. Thereafter, the accused was arrested and he was sent up in due course to the Magistrate to have his confession recorded. The accused reached the Magistrate whose camp was at Sampkhand and made a confession on 11th January 1918.

In this confession he implicated three persons, Narsappa, Abdul Ajij, and Faridsab, as being concerned in this murder, and, briefly speaking, he admitted that he was present, and saw the actual commission of the crime by these three persons. This confession is very long and full of details describing fully the first meeting of the deceased and the accused at Halgeri, the trip to Byadgi, the business done at Byadgi, the return journey from Byadgi to Halgeri, his movements at Halgeri on 4th January his journey from Halgeri at night towards Hukli, and the details connected with the occurrence of the murder of Dev Naik. Then, on 1st February 1918, the committing Magistrate, to whom the case was sent up against the three persons named by him and the present accused tendered a pardon to him under S. 337, Criminal P. C.; and he was specifically warned that the essential condition of the tender of the pardon was that he was to make a true and full disclosure of the whole of the circumstances within his knowledge relating to the murder of Dev Naik and that, if he failed to fulfil that condition, he would forfeit the pardon, that he would be liable to be tried on the charge of murder, and that his statement could be used in evidence against him. He accepted the pardon and he was then examined by the committing Magistrate on 1st and 2nd February 1918. He substantially repeated the story told by him in his confession in the same detailed manner. Ultimately, at the trial of Narsappa, Abdul Ajij and Faridsab, on the charge of murder of Dev Naik, he repeated the same statement in March 1918. This statement also is detailed and substantially a repetition of the story told by him in the first confession. The result of the trial however was that the three accused who were then charged with the murder of Dev Naik were acquitted and the learned Ses-

sions Judge suggested that the proper authorities should investigate into the conduct of the investigating Sub-Inspector, Malhar Bhatt, and various matters connected with the investigation. At the end of the trial apparently the present accused was allowed to go. There is no mention made in the judgment as to the opinion formed by the Judge about the effect of his view of the case on the pardon tendered to Cunna.

Subsequently, there was an investigation by a Sub-Inspector belonging to the Criminal Investigation Department apparently against Malhar Bhatt. There is no evidence in this case as to the details of this investigation, nor is there anything to show as to when exactly it was definitely realized by the Crown that the story told by Cunna at the murder trial was positively false. We find that proceedings were initiated against Malhar Bhatt in the beginning of the year 1919.

In January 1919 the present accused was examined as a witness in the case before the committing Magistrate when in effect he stated that the murder was committed by him and two others whose names he was not prepared to mention, and he gave a detailed account as to how he was induced by Malhar Bhatt to put forward the detailed story which he had put forward in his confession and how Malhar Bhatt had promised to see him safe with reference to the charge of murder. He also narrated that he had given Rs. 350 as a bribe to Malhar Bhatt in consideration of the favour which he had undertaken to show to the accused. Malhar Bhatt was in fact charged with giving and fabricating false evidence, with falsifying official records with a view to save Cunna from legal punishment, with receiving bribes from the accused Cunna and his father, and with extorting money from Bira, the brother of the deceased, Dev Naik. Malhar Bhatt was committed to the Court of Session and at his trial the present accused made another statement in May 1919 in which he substantially adhered to the story which he had stated before the committing Magistrate in that case. Malhar Bhatt was convicted of all the charges. The learned Judge observed at the end of his judgment that it would be obvious to all concerned that Cunna had not fulfilled the condition upon which his pardon depended.

Thereafter, apparently, proceedings were taken against the present accused on the charge of murder in December 1919, and as a result of those proceedings he was tried by the Sessions Judge of Kanara with the aid of assessors. The assessors were divided in opinion. One was of opinion that the accused was guilty; the other was of opinion that he was not guilty. The learned Sessions Judge came to the conclusion that the charge against the accused was established and sentenced him to death subject to confirmation by this Court. We have considered the appeal preferred by accused as also the question of the confirmation of sentence.

There can be no doubt in the case that Dev Naik was murdered on the night of 4th-5th January 1918. He was last seen before he left Halgeri for his native village of Hukli on the evening of the 4th by the wife of the present accused at her place, and subsequently was found dead with a number of wounds on his person without the money which he had with him. The medical evidence also indicates that, in all probability, there were more persons than one concerned in this crime. The evidence in the case, apart from the statements of the accused, with which I shall presently deal, is meagre as to the identity of the murderer. That evidence is sufficient to suggest a suspicion against the accused. But, apart from his statements, the evidence, in my opinion, is wholly insufficient to establish the guilt of the accused. That is the view taken by the Sessions Judge, and with that view I agree. There is nothing definite against the accused in his immediate conduct after he was seen by the Police Patel when the information of the death of Dev Naik was received and after the Sub-Inspector arrived on the scene. In the present proceeding he has denied his guilt; and his having pointed out the two pieces of a scythe is not of any real importance to connect him with the crime in view of the disclosures as to the production of property and the stains of human blood on the scythe and the pen-knife in the proceedings against Malhar Bhatt. The witness, Kare Naik, has been examined to prove an oral confession made to that witness. The Judge has refused to rely upon that evidence and in my opinion rightly. The evidence of the witness, Ganesh, is not sufficient to

establish any confession on the part of the accused, and if the other statements of the accused are not admissible, it is difficult to see how the evidence of Ganesh could be relied upon to establish any confession on the part of the accused.

The question of the admissibility and the weight to be attached to the various statements which the accused has made is very important in this case, because the conviction could be sustained, if at all, provided those statements are found to be admissible in evidence and reliable so far as they relate to his inculcation in this crime. I shall first deal with the confession made by the accused on 11th January 1918. That was a confession recorded by the First Class Magistrate under S. 164, Criminal P. C. The subsequent disclosures clearly establish the fact that that was a statement made by the accused when he was entirely under the influence of the then investigating Sub-Inspector, who undoubtedly had offered him inducement to make it, and that is enough to make the confession irrelevant under the provisions of S. 24, Evidence Act. I do not desire to elaborate this point because that view was not contested by the learned Government Pleader.

The next two statements in point of time are the statements which he made before the Committing Magistrate and the Sessions Court in the murder case against the three innocent persons. At that time he was examined as a witness because a pardon was tendered to him under the Criminal Procedure Code, and it is clear to my mind that under S. 339 the accused, by wilfully concealing essential information and making false statements with regard to those persons who were then under trial, did render himself liable to be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he might have been guilty in connexion with the same matter. These statements which are made in the proceeding in which the accused was examined on oath as a witness in virtue of the pardon tendered to him may be given in evidence against him under S. 339 (2), when the pardon has been forfeited.

I just pause here to deal with the point as to whether the pardon is forfeited. The accused has not relied upon the pardon at this trial; and it seems to me

clear, in view of the statements which he subsequently made in Malhar Bhatt's case, that he failed to fulfil the condition of making a full and true disclosure of the whole of the circumstances within his knowledge relating to this murder and to every person concerned whether as principal or abettor in the commission thereof. Therefore these statements may be given in evidence against him.

It is urged however on behalf of the accused, that the provision in S. 339 (2) does not entirely abrogate or supersede S. 24, Evidence Act, so far as these statements are concerned, and that the express provision is intended to make it clear that the tender of pardon would not make them inadmissible. It is argued that if it can be shown in a particular case that, apart from the inducement of the legal pardon, the witness has given his evidence under such other influence as would invite the application of S. 24, Evidence Act, the particular statement which would amount to a confession on his part would be irrelevant. On the other hand, it is urged for the Crown that S. 339, sub-S (2), Criminal P. C., practically supersedes S. 24, Evidence Act, when once a pardon is tendered to a person and accepted by him and that person has given evidence as a witness under the benefit of that pardon. This is by no means an easy point; and after a careful consideration of the arguments urged on both sides, I have come to the conclusion that though the statements made by an approver may be given in evidence against him under sub-S. (2), S. 339, Criminal P. C., it cannot be said that the operation of S. 24, Evidence Act, is altogether excluded. Ordinarily, the inducement that would appear on the surface would be the inducement of the pardon legally tendered and accepted under the provisions of the Criminal Procedure Code. But if it is shown in any case that there was some other influence simultaneously proceeding from any other authority which would invite the application of S. 24, Evidence Act, I do not think that the confessional part of the statements which can be given in evidence against the accused under S. 339, sub-S. (2), Criminal P. C., can be treated as relevant in spite of the provisions of S. 24, Evidence Act.

In briefly stating the reason for this conclusion, at the outset, I desire to deal

with the arguments urged by the learned Government Pleader with reference to the limitation of S. 24, Evidence Act. It was first suggested that the statements made on oath, even though of an incriminating nature, is not a confession contemplated by S. 24, Evidence Act. In my opinion the provisions of S. 24 are general and are intended to exclude confessions, which have been improperly obtained. The word "confession" means an admission of a criminal circumstance which suggests the inference that the person making the statement committed the crime. The observations in *Queen Empress v. Nana* (1) and *Imperatrix v. Pandharinath* (2), show that any statement made by a person which would suggest an inference as to his guilt may be confession within the meaning of S. 24, Evidence Act. In the present case the confessional part of these two statements is clear. The accused admits therein his presence at the murder, but not any active participation in the commission of the crime. That is clearly a confession.

The second general consideration urged by the learned Government Pleader is that S. 24 applies only to the case of an accused person at the time when he makes his confession, and in support of this argument he has relied upon the observations of Maclean, J. in *Empress v. Nobin Chandra Banikya* (3) and certain remarks in *Empress v. Mahamadbuksh Karimbuksh* (4). In my opinion however S. 24 would apply even if the person who is said to have made the confession was not an accused person at the time that he made the confession. It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession. In fact if the argument that the person accused was not an accused person at the time when he gave his evidence as a witness to whom a pardon is legally tendered were a sufficient answer to the application of S. 24, it might almost establish that the provision in sub-S. (2), S. 339, Criminal P. C., would be superfluous. The object and scope of S. 24, in my opinion clearly indicate that it would not be

(1) [1890] 14 Bom. 260 (F. B.).

(2) [1881-82] 6 Bom. 34.

(3) [1883] 8 Cal. 560=10 O. L. R. 369=4 Shome L. R. 232.

(4) [1906] 8 Bom. L. R. 507=4 Cr. L. J. 49.

right to read such a limitation as the argument urged by the Government Pleader in my opinion involves. The section does not refer in terms to any particular time when the confession, in order to be within the scope of the section, must be made. It is quite enough that the confession is subject to the infirmities which are laid down in that section, and if it is made by an accused person either at a time when he was an accused person, or before he came to be accused, or even at the time when he was under the benefit of the pardon, in my opinion, it could not be said that S. 24 on that ground would not apply. The observation in *Empress v. Mahamadbuksh Karimbuksh* (4) must be read with reference to the context, and I do not think that the point was decided in that case in the sense in which the learned Government Pleader has contended before us.

The question really is whether the application of S. 24, Evidence Act, is completely excluded in the case of statements to which the provisions of S. 339 (2), Criminal P. C., apply. I do not think so. S. 339 (2) simply provides that when the legal pardon is forfeited the statement may be given in evidence against him, which in substance means that, in virtue of the tender of pardon, which the person concerned has subsequently forfeited under the section, he will not be protected from the effect of having made the statement on oath when he was under the benefit of that pardon. But there is nothing either in the terms or the reason of the rule to indicate that S. 24 cannot apply to a confession contained in the statement, even though the facts necessary to invite its application are established. If it can be shown in any case that the person making the statement was at the time under inducement other than and in addition to the inducement of a legal pardon, I do not see any reason why S. 24 should not apply. No doubt, very strong and clear evidence of the operation of such other influence would be required. But in law, I think, it is open to an accused person to establish the existence of such inducement. Thus, the question to my mind is whether it is shown on the evidence whether the conditions necessary to invite the application of S. 24 have been fulfilled.

Before I proceed to deal with this question, I desire to say a word with re-

ference to the decision in the case of *Fakira Appaya v. Emperor* (5). That was a case relating to a statement made by an accused person before the committing Magistrate with reference to which S. 287, Criminal P. C., provides that it shall be tendered by the prosecutor and read as evidence. Whether in the case of such a statement there is any real scope for a possible application of S. 24, Evidence Act, or not is a matter upon which it is not necessary to express any opinion in this case. In *Fakira Appaya v. Emperor* (5) my brother Hayward was of opinion that S. 24, Evidence Act, would have no application. Batchelor, J., did not express any decided opinion on the point. It may be, as suggested by the Government Pleader, that the inclination of his opinion was in favour of the view that S. 24 could not apply. But the phraseology of S. 287 is different from that of sub-S. (2), S. 339; and the case has no direct application, in my opinion, to the question that arises in this case with reference to the statements made by an approver. I am unable to hold, on the strength of the opinion expressed in that case, that S. 24 can have no application to the statements made by a person, who has accepted the tender of pardon and who has forfeited it. I have already given my reasons for the view which I take as to the possible application of S. 24 in a case in which the necessary facts are established.

In the present case the question is, whether these two statements which the accused made as a witness in the murder trial are shown to have been improperly induced so as to invite the application of S. 24, Evidence Act. I am of opinion that it is shown that they were the result of improper inducement on the part of the investigating Sub-Inspector, Malhar Bhatt. In coming to this conclusion I have given full weight to the circumstance that not only according to law, but in view of the explicit manner in which the conditions of the pardon were brought home to the accused, it may be said that the statements could not have been made under any other inducement. In spite of this clear warning of the Magistrate that he was expected to make a true and full disclosure of the facts relating to the murder, he straightaway proceeded to make statements which are

(5) [1916] 40 Bom. 220=33 I. C. 209.

now shown and admitted to be false. Those statements are exactly in accordance with the previous confession which he had made before the Magistrate, and which was recorded under S. 164. It is, in my opinion, difficult to resist the inference that at the time when he made his statement on oath the real influence which was operating on his mind was not only the influence of the legal tender of pardon, but also the most objectionable influence of the Sub-Inspector.

It is in my opinion, not right to ignore the facts which are not now in dispute, and which clearly show how the Sub-Inspector was then exercising his influence on the present accused and how he was perverting the cause of truth and justice. Undoubtedly the accused became a party to it so much so that even at the risk of forfeiting the legal pardon he has prepared to make these false statements. In my opinion the force of that inducement must have been simply irresistible at the time he made these statements before the committing Magistrate and at the trial. It is on that basis that the series of lies which he has stated on oath on both these occasions can be truly explained. It is clear on the facts not now in dispute, that the confessional parts of these two statements could not be properly treated as having been the result of the legal pardon merely which was tendered to him to elicit the truth but to a great extent induced by the influence which the Sub-Inspector was then exercising over this accused. I fully recognise that the accused was undoubtedly as ready and most objectionably ready to subject himself to this influence, as the Sub-Inspector was ready to exercise it. But even in the case of such a person I do not see how S. 24 can be said to be inapplicable. In my opinion, it is not reasonably possible to avoid the inference which I have stated with regard to the application of S. 24 as regards the confessional parts of these two statements.

Assuming however for the sake of argument, that these two statements are admissible under S. 339, Cl. (2), Criminal P. O., speaking for myself, I am not prepared to attach any weight whatever to these two statements. These statements are substantially repetitions of what was stated in the confession, and there are so many false statements relating to three innocent persons that it is not easy to

separate the truth from the falsehood. It is no doubt a strong argument in favour of accepting these statements that a person would not lightly and wrongly inculcate himself. Ordinarily, it would be a strong consideration. But having regard to the way in which the truth and the course of justice have been perverted in this case, under the objectionable influence of the then investigating Sub-Inspector, and the extent to which the accused has mixed up falsehood with such truth as there might be in the statements, I would consider it really unsafe to attach any weight to statements made under those circumstances.

I now come to the statements which the accused made in the case against Malhar Bhatt. These are, to my mind, the most important statements, and if they are admissible in evidence, undoubtedly there is a strong case against the accused. The difficulty however with regard to these two statements, which presents itself to my mind is as to the admissibility of the confessional parts thereof. At the time when these two statements were made, the legal position of the present accused was that he was liable to be tried on a charge of murder, and that he was a competent witness in the case against Malhar Bhatt. Ordinarily, if there was nothing else, his statement of an incriminating character made on oath without any objection raised by him as to his obligation to answer the question put to him as a witness would be admissible. At one time I felt some doubt as to whether those statements would be admissible in view of the proviso to S. 132, Evidence Act. But the learned Government Pleader has shown, in my opinion, satisfactorily, that in spite of the diversity of judicial opinion on this point it is now a settled rule that unless a person objects to any question the answer to which is likely to incriminate him, he cannot be said to have been compelled to give such answer within the meaning of the proviso. This diversity of judicial opinion is sufficiently indicated in *Queen-Empress v. Ganu Sonba* (6) and *Queen v. Gopal Dass* (7), and whatever may be my view as to the proper interpretation of S. 132, Evidence Act, including the proviso, I think that the position must be accepted that the

(6) [1888] 12 Bom. 440.

(7) [1881] 3 Mad. 271=2 Weir 782 (F. B.).

answers which the witness has given, though of an incriminating character, could be proved against him in the trial to establish the offence to which those incriminating answers relate.

The difficulty however which remains with reference to these statements arises from the provisions of S. 24, Evidence Act. The learned Sessions Judge on this point has taken the view that the facts which would invite the application of S. 24 with reference to these two statements are established, but in his opinion the statements are saved under S. 339, sub-S. (2), Criminal P. C., and could be admitted in evidence under that subsection. In my opinion, sub-S. (2), S. 339, has no application to the statements made by the accused in Malhar Bhatt's case. They were not made by him as a person to whom any pardon was tendered with reference to the charge that was under investigation, and, reading S. 339, Cl. (2), in relation to the context, it is clear to my mind that these statements could not be admitted in evidence in virtue of the provisions of S. 339, sub-S. (2), Criminal P. C.

The question is whether the confessional parts of these statements are irrelevant under S. 24, Evidence Act. If it appears to the Court that the statements were made as the result of any inducement having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him the confession contained therein would be irrelevant. I am clearly of opinion that S. 24, as a matter of law, would apply if the conditions necessary for the application of that section are established and the question is purely one of fact as to whether the confessional part of these statements is shown to have been the result of such inducement as is described in S. 24. The facts relevant, in my opinion, with reference to this point are that when the murder trial ended in favour of the three accused who were then charged, the present accused was allowed to go. There was no observation in the judgment that the pardon was forfeited and,

according to the facts then known it was not clear that his pardon was forfeited.

Though the accused must have known that he had not fulfilled the conditions essential to retain the benefit of the pardon, he could not be reasonably expected to believe that his pardon was forfeited. Then, nearly for a year, there were no proceedings. In the beginning of 1919 proceedings were taken against Malhar Bhatt. No evidence is adduced by the prosecution in the present case relating to the investigation carried on during this interval. It is not shown that anything was done either in the course of the investigation or at the trial of Malhar Bhatt to put this witness in mind of his real position that he had forfeited the pardon, and that at the date he was liable to be tried on a charge of murder. Under the conditions under which the accused came to be examined in Malhar Bhatt's case, it seems to me that the accused then had grounds which would appear to him reasonable for supposing that, by adhering to the incriminating statement as regards himself, he would gain some advantage or avoid some evil of a temporal nature in reference to the charge of murder. It seems to me that the learned Judge's conclusion that the impression produced by the pardon had not ceased to operate at the time is right. In my opinion those two statements were made under the influence of the pardon which was in fact tendered, but with regard to the forfeiture whereof nothing had been done or said by any authority up to the time that he came to make those statements. The circumstances were peculiar, and on the special facts it is difficult to avoid the inference as to the inducement operating on his mind. To start with, there was a very improper inducement offered by the investigating Sub-Inspector, then there was the tender of a pardon, and after the trial of the case in which he was examined as an approver, for nearly a year no steps had been taken against him to put him on his trial on the charge of murder.

It is, in my opinion, quite natural for a person in that position to believe, though there may be no legal justification for it that he was safe in adhering to the incriminating statement regarding himself. Thus at the time of these statements, his liability to be tried on the charge of

murder was there. His fate depended upon the will of the Crown, i. e., as it would appear to the witness to a certain and appreciable extent upon the will of the then investigating officer. It was open to the Crown not to take any action against him: at least so it would appear to the person concerned. Under those circumstances the Crown should have definitely made it clear to him that he was going to be prosecuted. In the absence of any such clear indication of his true position in fact, it is difficult to avoid the inference that the accused made his statements under an erroneous but honest belief that he was securing an advantage of a temporal character by adhering to the self-inculpation and by exposing Malhar Bhatt; and it is difficult to dissociate this belief from the inducement which must be taken to have operated on his mind in consequence of the apparent silence of the investigating officer in Malhar Bhatt's case as to whether he was going to be tried on the charge of murder or not.

It is true that there is no direct evidence of such inducement. But the situation that arose was such that, unless the impression created thereby was completely removed, its existence must be inferred. This brings me to the argument based on the words of S. 28, Evidence Act. I agree that the impression created by Malhar Bhatt was completely removed when the accused saw him in the dock and gave evidence against him. But the impression created by the tender of pardon, apparently not declared forfeited by any responsible authority with no proceedings against him for nearly a year, was not completely removed. At least, it is not shown by the prosecution that it was so removed. S. 28 shows that once an impression of any improper inducement is created, it is necessary to show that it is completely removed to make the statement relevant. The learned Government Pleader has relied upon S. 29 to show that the confession does not become irrelevant merely because he was not warned that he was not bound to make such a confession and that evidence of it might be given against him. But this argument ignores the effect of the words "if such a confession is otherwise relevant" and of the expression "merely because." In the present case the confessions contained in the

statements appear to me to fall within the scope of S. 24, and are therefore irrelevant: and the argument for the defence does not seek to make the statements irrelevant merely because the accused was not warned that he was not bound to make such confession and that the evidence of it might be given against him. The argument based on S. 29 affords no sufficient answer to the difficulty which exists in the way of the prosecution in this case in asking the Court to take these statements into consideration against the accused so far as the charge of murder is concerned. It is with regret that I have felt myself constrained to come to this conclusion, because the result of it is that none of the statements made by the accused can be taken fairly into consideration against him in this case. Of whatever atrocious mendacity this accused may have been guilty, for which he may be still liable to be prosecuted, I find it difficult to avoid the conclusion that these confessions cannot properly be admitted in evidence against him, and the set of statements which he made at the murder trial, even if admitted in evidence, do not, in my opinion, afford any safe basis for his conviction.

The result is that this charge of murder is not established against the accused. I would therefore allow the appeal, set aside the conviction and sentence, and order him to be acquitted and discharged.

Hayward, J.—The accused, Cunna, appeals against his conviction of the murder of his uncle, Dev Naik, on the early morning of Saturday, 5th January 1918 on the high road near the village of Mensi between Halgeri and Hukli in the Kanara District. The case comes before us also for confirmation of the sentence of death passed upon him by the Sessions Judge of Kanara under S. 302, I. P. C.

The accused Cunna lived in the village of Halgeri and his uncle Dev Naik lived about 9 miles off at the village of Hukli in the jungles of Kanara. They had proceeded together on a journey of several days to sell betel-nuts belonging to the deceased Dev Naik at the town of Byadgi in the Dharwar District. The accused Cunna and his uncle Dev Naik had returned together with certain purchases that they had made and with the remainder of the Rs. 400 obtained for the betel-nuts in the pocket of Dev Naik.

The accused Cunna was the last person known to have been with his uncle Dev Naik when the latter set out alone with the remainder of the Rs. 400 in his pocket upon his return journey in the early morning of Saturday the 5th January 1918 from the accused Cunna's house in Halgeri to the deceased Dev Naik's village of Hukli. It was rumoured on the morning of Sunday, the 6th January 1918, that Dev Naik had been found dead upon the high road near the village of Mensi between Halgeri and his home at Hukli in the Kanara District.

Now the accused Cunna confessed in great detail in the course of the subsequent investigation that he and three others were concerned in causing the death of Dev Naik. It was an exculpatory confession laying the blame mainly upon the three other men. It was recorded on 11th January 1918 by the First Class Magistrate, who was subsequently the committing Magistrate. It has since been established that this confession had been improperly obtained by the promise of security offered in consideration for his giving up the Rs. 400 that he had obtained by the murder to the investigating Sub-Inspector, Malhar Bhatt. It was accordingly held at the trial that the statement was inadmissible in evidence and rightly so held in my opinion in accordance with the provisions of S. 24, Evidence Act.

The accused Cunna was however offered a pardon on 1st February 1918, and the conditions of the offer were specific and were specifically accepted. The question put to him was:

"Are you willing to accept a tender of pardon on condition of your making a true and full disclosure of the whole of the circumstances within your knowledge relating to the murder of Dev Naik?"

He answered:

"Yes. I accept tender of pardon and abide by the responsibility."

"Do you understand that the said tender of pardon will be forfeited if you wilfully conceal anything essential or give false evidence and that you will be then tried for murder?"

He answered:

"I understand all this and accept the tender of pardon."

He thereafter repeated the story he had already told in all its details on 1st and 2nd February and on 4th March 1918 before the First Class Magistrate, who was then the committing Magistrate.

He again repeated the statement in full detail on 15th and 18th March 1918 before the Sessions Court. It was then believed to be probably true as regards his own presence at the murder, but to have been wholly unreliable as to the part said to have been taken by the other three men who were then undergoing their trial for the murder of Dev Naik. These other men were accordingly acquitted upon the concurrent findings of both the assessors and the Sessions Judge.

It has been urged before us on his behalf that these two statements also ought to be excluded as inadmissible by reason of the provisions of S. 24, Evidence Act. It has been urged, on the other hand, that there is a distinction between confessions made during investigations referred to in Ss. 24 to 30, Evidence Act, and S. 164, Criminal P. C., and statements formally recorded in trials referred to in Ss. 209 and 287, Criminal P. C. It has been urged that while those made in the Courts of investigation might well be excluded from the trial, the latter hardly could be. They form in fact themselves a part of the incidents of the trial and there has been enacted the express legislative provision that they should be read as evidence in S. 287, Criminal P. C. It is not necessary for me to elaborate my opinion upon this point as these are not the kind of statements here in question, and the matter regarding them has been sufficiently dealt with for the present purposes in the case of *Fakira Appaya v. Emperor* (5). But there is this similarity between them and those here in question, namely, statements on oath under promise of pardon, that it has similarly been expressly enacted that such statements should, when pardon has been forfeited, be inadmissible in evidence against the maker under S. 339, Cl. (2), Criminal P. C. It would, in my opinion, be a straining of language to say that those statements were induced by the previous promise of obtaining a pardon held out by the investigating Sub-Inspector, Malhar Bhatt and so inadmissible under S. 24, Evidence Act, and that they were not induced by the pardon actually thereafter obtained from the committing Magistrate. There would, in my opinion, be no doubt whatever that those particular statements, if induced by the pardon, having

been false in respect of the three other men had worked a forfeiture of the pardon, and indeed the defence in the present trial had not endeavoured to rely upon the pardon. The issue was distinctly raised in these words: "Do you say that you have been pardoned for the offence charged against you?" The answer was: "I did not kill the man, and I therefore do not rely on that pardon." It seems to me therefore that there can be no doubt that those two statements were rightly admitted in evidence for what they were worth at the trial by the learned Sessions Judge under S. 339, Cl. (2), Criminal P. C.

If these had been the only statements made it might have been argued with some force that they were not sufficient to bring home the charge to the maker. They had been held to be false in some material particulars. But there were two further statements made subsequently in the course of the proceedings taken for bribery and fabricating false evidence of murder against the investigating Sub-Inspector, Malhar Bhatt. Cunna admitted in those statements that he was himself guilty of the murder. He admitted that there were other men with him, but he also admitted that they were not the men previously mentioned and tried, and he declined to give the names of the men who were really his accomplices in the murder. He made these statements on 27th and 28th January 1919 before the committing Magistrate, and on 17th and 19th May 1919 at the trial before the Sessions Court.

It has again been urged before us that these two statements ought to be excluded from evidence under S. 24, Evidence Act. It has been urged that they were made under the inducement proceeding from the previous pardon, and that therefore they were inadmissible, and that as they were not statements in the course of the trial for murder, they were not within the provisions of S. 339, Cl. (2), Criminal P. C. It seems to me however that the fallacy of this argument lies in the first proposition that they were induced by the pardon within the meaning of S. 24, Evidence Act. It is true, no doubt, that he had been offered a pardon, but the terms of that offer were specific and had been specifically accepted. He then knew that if he made false statements he would forfeit

his pardon. He must have known that he had made false statements when he implicated three innocent men at the trial for murder. He must moreover have been perfectly well aware that his statements were known to be false as the three men whom he had accused had been acquitted by the concurrent finding of both the assessors and the Sessions Judge. He must have known that the force of the pardon was spent and this has been shown by the fact that he did not venture to rely upon that pardon at his trial. It seems to me therefore that it would be mere sophistry to say that the inducement to make the further statements implicating himself was the forfeited pardon. The inducement was to my mind sufficiently plain.

It was his own self-interest. He was anxious at all costs to save his own skin, and he thought there was just the possibility that he might do so by repeating the statements and turning upon his previous protector then in the dock, the investigating Sub-Inspector, Malhar Bhatt. This was no doubt the reason which prevented his having recourse to the provisions of S. 132, Evidence Act. It has been suggested that he ought to have been warned of his position and that as he was not warned he ought to be given the benefit of those provisions. But that has been held not to be the law by the concurrent decisions of all the High Courts. It has been held that if a man voluntarily makes an incriminating statement, he must take the consequences for it. He can only plead protection if he has specifically declined to make the statement and has been specifically compelled to do so by the Court. He made no such effort in this case, and he is therefore not entitled to the benefit which has been pleaded for him of S. 132, Evidence Act. It seems to me therefore that these two statements, made voluntarily in the subsequent proceedings for bribery and fabricating false evidence against his previous protector, the investigating Sub-Inspector Malhar Bhatt, were admissible and were rightly held to be admissible in evidence against him, and were not barred by the provisions of S. 24, Evidence Act. It is unnecessary therefore to discuss the further question raised whether they were or were not within the provisions of S. 339, Cl. (2), Criminal P. C. It seems to me sufficient

to say that they have not been shown beyond all doubt to have been within them and that it would not, in my opinion, be proper in this particular matter to rely upon the provisions of S. 339, Cl. (2), Criminal P. C.

It seems to me, if these statements were rightly admitted in evidence, that the guilt of Cunna was hardly disputable upon the merits. The details of his two statements in the original trial were too full and lurid to have been the pure invention of a person who had never been present and had taken no part in the murder and they were confirmed as to his presence with the further indication that he must have taken a prominent part in the murder by his subsequent statements in the trial of the investigating Sub-Inspector, Malhar Bhatt. It has also to be remembered that he was the last man known to have been with the deceased, that he was the man who knew that there were Rs. 400 in the pocket of Dev Naik, and that he was the man who on his own admission produced in the subsequent investigation the two pieces of broken sickle which it was stated had been used for the murder. It seems to me therefore that the guilt of Cunna has been fully established and that he has been rightly convicted of the murder of his uncle Dev Naik on the opinion of one of the assessors, by the learned Sessions Judge.

It seems to me further after careful consideration that the sentence passed upon him was the right one. Consideration has been given to the delay. But it has only been too evident that the delay was of his own making for the purpose of saving his own skin and getting three innocent men hanged for the murder. Consideration has been given to the influence exercised upon him by the corrupt Sub-Inspector, Malhar Bhatt. But it has only been too evident that he readily fell in with the proposal to obtain security from punishment by the payment of the Rs. 400 obtained by the murder to the grasping Sub-Inspector, Malhar Bhatt. Consideration has also been paid to the fact that he was offered a pardon. But it has become only too evident that he forfeited that pardon by malicious perjury that he knew that he had forfeited it. But that, nevertheless, with the hope of still saving his own skin he turned against his former pro-

tector, then impotent in the dock, the Sub-Inspector, Malhar Bhatt. It seems to me impossible in view of his conduct throughout and the brutality of the murder to record grounds which would be sufficient to justify us in holding that the sentence of death was not properly passed upon him by the learned Sessions Judge. It seems to me therefore that we ought to confirm the conviction and the sentence of death passed upon Cunna and that his appeal ought to be dismissed by this Court.

Heaton, Ag. C. J.—There is no time left for me to state my reasons with any fullness, so that all I will say is that I doubt whether although I agree with my brother Hayward, my reasons would altogether correspond with his. I largely disagree with my learned brother Shah. We are however all agreed that the confession made by Cunna in the course of the police investigation conducted by Malhar Bhatt into the murder cannot be used as evidence. I hold that in the particular circumstances of this case, the statements made by Cunna in the murder case when he deposed as a witness are not inadmissible in virtue of S. 24, Evidence Act, for they are removed from the operation of that section in virtue of Cl. (2), S. 339, Criminal P. C. And I hold in the particular circumstances of this case that the two statements made as a witness by the accused in Malhar Bhatt's case were not caused by any inducement, threat or promise within the meaning of S. 24, Evidence Act. I will just add a word or two on this point. What the accused himself says about these statements, in so far as he says anything at all, is that they were induced, not by anything that Malhar Bhatt had said nor by the pardon offered him by the Magistrate but by what was done by a Criminal Investigation Department officer in the course of the latter's inquiry.

I think to hold that these statements were caused by the inducement offered by the Magistrate when the pardon was tendered is far too conjectural an inference. We do not know what was in the accused's mind. He has not told us himself. The circumstances are so complex and they cover so long a period of time that, speaking for myself, I feel it quite impossible to say with any degree of certainty what was in his mind, what he

hoped to gain, what he hoped to avoid by making those statements. But, in so far as I can conjecture at all, I do not conjecture that he made those statements because of the pardon which had been 12 months earlier offered him by the Magistrate. When once those statements and the two earlier ones are admitted in evidence, the conviction of the accused is inevitable. I find nothing in this case to excite in my mind any feeling of commiseration. I find nothing that lightens the treacherous wickedness of the man who committed the murder and I think if there ever can be a case in which the punishment of death is deserved that this is such a case. Therefore I think that not only the conviction but the sentence should be confirmed.

G.P./R.K.

Sentence confirmed.

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PRATT, J.

Advocate-General of Bombay—Plaintiff.

v.

Vithaldas Meghji—Defendant.

Original Civil Suit No 36 of 1918, Decided on 9th December 1919.

(a) Succession Act (10 of 1865), S. 111—S. 111 only applies where contingent event is left uncertain—Bequest to widow and daughter for life and after that alternative gift to daughter's male issue that may be born or in charity—Gift to male issue held void—Gift to charity was valid.

Section 111, Succession Act, contains merely a rule of construction, and is subject to any provision in a Will which may rebut its application. The intention of the rule is, that, when there is a gift followed by a contingent gift over, the inclination of the Court is to interfere as little as possible with the first gift, the second gift being read as a gift in substitution and not in remainder, where therefore the expressed intention of a testator is to create a life-estate, the provisions of the section cannot be invoked to convert that estate into an absolute estate. The section is applicable only where the time of the occurrence of an event is left uncertain,—as where a contingent gift is made to depend upon the death of the legatee. [P 282 C 1, P 283 C 1]

Where a Hindu makes a bequest in favour of his widow, and on her death a gift to his daughter for life, and after that an alternative gift, on the one hand to her male issue, if any, and, on the other hand in default of male issue, to a charity, the bequest to the male issue is void but not the alternative bequest to charity. [P 282 C 2]

(b) Hindu Law—Will—Hindu testator has power of defeasance of prior absolute estate on happening of certain event.

A Hindu testator is competent to provide for the defeasance of a prior absolute estate contingently on the happening of a future event,

as where a life-estate is bequeathed to a widow with power of disposition during her lifetime, and after her to her daughter and neither of them exercises that power. [P 283 C 2]

*Strangman and Kanga—*for Plaintiff.
*Chimanlal Setalvad. Taraporewalla Desai and Coltman—*for Defendant.

Judgment—This is a suit filed by the Advocate-General as representing a charitable trust—the Anathashrama—created by the Will of Hansraj Ludha. The plaintiff prayed for a declaration of the properties that were the subject-matter of the trust and for the removal of defendant 1 from the office of trustee and for the administration of the estates of Hansraj Ludha and of his wife and of the trust properties. But by consent the suit has been confined to one for declaration as to what properties are subject to the trust and for the preparation of a scheme for the administration of the charity. Defendant 1 is the trustee and supports the Advocate-General. Defendant 2 claims certain properties adversely to the trust and it is against him that the declaration is sought.

Hansraj Ludha died at Jamnagar on 27th May 1901 leaving a widow Hiravahu and a daughter, Jivibai. His property consisted of :

(a) A house in Bombay—the Ramdas Mala. (b) Two houses in Jamnagar. (c) Moveables, consisting of, (i) a fund standing in the name of a former wife and of Hiravahu ; (ii) household effects and furniture ; (iii) Hiravahu's Stridhan; and (iv) the assets of his business termed " Punji " in his Will.

The provisions of Hansraj Ludha's Will (omitting details not relevant for the purposes of this suit) are as follows :

The trust fund is set apart out of the Punji : some of the surplus is applied to legacies ; and the rest of the Punji, the Stridhan, and the fund in the wives' names and household effects and furniture are given to Hiravahu absolutely Cls. 7, 5 (a), 5 (b) and 5 (c) of the Will. The Jamnagar houses are given to Hiravahu absolutely.

The Ramdas Mala is disposed of by Cl. 5 (d) of the Will, under which Hiravahu is given a life estate with a power of disposition for specified purposes in her lifetime.

But all the bequests to Hiravahu are subject to Cl. 9, under which they are all declared to be to Hiravahu for life, on

her death to Jivibai for life and on Jivibai's death to her lineal male descendants, if any, and if not to be Anathashrama Charity.

Hiravahu died a year after her husband, on 5th June 1902. She made no disposition in her lifetime of the Ramdas Mala but left a Will in which she expressed her intention to conform in all respects to the direction contained in her husband's will and then proceeded to make the following dispositions :

The Mala she gives to Jivibai and in case of her death without male lineal descendants to charity (Cl. 11 (3)).

The Jamnagar houses to Jivibai and in case of her death without male descendants to her sister's sons (Cl. 13).

The surplus of the Punji and the wives Khata she bestows in legacies and to other charities (Cl. 16).

The Stridhan and household effects she gives to Jivibai absolutely (Cls. 14 and 15).

But all the bequests to Jivibai are subject to a defeasance clause—Cl. 31 of the Will—in case of her death without children.

Jivibai died childless in 1912.

Now the trustee of the Anathashrama is defendant 1 who is the executor of both the Wills. He has possession of the part of the Punji set apart for the charity. But the Advocate-General claims, for the charity, the Ramdas Mala, the Stridhan, and the household effects, the surplus of the Punji and the wives' Khata. Mr. Taraporewalla, for the trustee, supports that claim.

As regards the Ramdas Mala the provision of Hiravahu's Will is inoperative for it is quite clear that, under the Will of Hansraj, Cl. 5 (d), Hiravahu was given a life-interest and a limited power of disposition during her life which she did not exercise.

The Mala is disposed of in Cl. 9 of the Will of Hansraj in the following words :

"All the property which Hiravahu may not have disposed of shall accrue to Jivibai on the following condition : Should there be Jivibai's lineal male descendants the said property shall go down to the said lineal male descendants but should there be no lineal male descendants of hers then to my Mala which there is in Bombay and which is known as that of Vithaldas Ramdas, if the same should be in the same condition in which it is now or as to the sum which may have been received either by the sale or mortgage thereof, the right thereto for life will accrue to Jivibai, (i. e., Jivibai shall have a life interest therein). But after Jivibai's lifetime the said property shall not go down to

Jivibai's heirs or to my heirs (but) the right in respect of this Mala in Bombay in whatever form the same may be at that time, shall form part of the 'Anathashrama Dharmada Fund' which fund I have set apart."

There is therefore after the death of Hiravahu a gift to Jivibai for life and after that an alternative gift, on the one hand to her male issue if, any, and on the other hand, in default of male issue to the charity. The bequest to the male issue is void under the rule in *Tagore case* [*Jotendromohun Tagore v. Ganendromohun Tagore* (1)] but that would not affect the other alternative bequest to the charities : *Joverbai v. Kablibai* (2).

The Ramdas Mala is however situate in Bombay and the construction of the Will, so far as it relates to this property is by S. 2, Hindu Wills Act, made subject to S. 111, Succession Act. It is therefore contended that as the gift over to the charities is contingent on Jivibai dying sonless, it cannot take effect unless that event overruled before the period of distribution, i. e., before Hiravahu's death in other words, the charity can only take if Jivibai died sonless in the lifetime of Hiravahu.

Section 111, Succession Act, embodies a rule in *Edwards v. Edwards* (3) which though overruled in *O'Mahoney v. Burdett* (4) has still statutory force in India. But it is at most a rule of construction and is therefore subject to any other provisions in the Will which may rebut its application.

The reason of the rule is that when there is a gift followed by a contingent gift over, the inclination of the Court is to interfere as little as possible with the first gift. The second gift is therefore read as a gift in substitution and not in remainder. In Ill. (b) to S. 111, Succession Act, the legacy is to A for life and after A's death to B, and "in case of B's death without children" to C. This is an absolute gift to B and the contingent gift to C only operates if the gift to B fails owing to B's death in A's lifetime. But if the gift to B were expressed by the testator to be for life only there is no scope for the operation of the rule. It

(1) [1872] I. A. Sup. Vol. 47=9 B. L. R. 377=18 W. R. 359=2 Suth. 692=3 Sar. 82. (P. C.).

(2) [1892] 16 Bom 492.

(3) [1852] 15 Beav. 357=21 L. J. Ch. 324=15 Jur. 259=51 E. R. 576=92 R. R. 464.

(4) [1874] 7 H. L. 388=31 L. T. 705=23 W. R. 361=14 L. J. Ch. 56n.

cannot be invoked to defeat the expressed intention of the testator and convert a life estate into an absolute estate. Again the occurrence of the event on which the contingent gift depends in the death of *B*. If the estate of *B* is not expressed to be a life-estate that does not sufficiently define the time of the event. Did the testator mean that *B* should have a life-estate and that the ultimate gift should take effect even if he survived *A*? Or did the testator mean that *B* should have an absolute estate and that the ultimate gift should only take effect if *B* died in the life-time of *A*? Thus even though the death of *B* is mentioned, the time of the event is left uncertain and the section comes in and fixes the time. But where *B* is expressed to have a life-estate, it is immaterial whether *B* dies before or after *A*. The death of *B*, therefore, sufficiently defines the time for the occurrence of the event. This circumstance excludes S. 111, which only applies where the time is left uncertain. The case of *Bhupendra Krishna Ghose v. Amarendra Nath Dey* (5) is an express authority on this point.

Now, in my opinion, the gift to Jivibai of the Ramdas Mala is for life, and, that being so, S. 111, Succession Act, would not govern the construction of this clause of the will. It is immaterial whether Jivibai died before or after the previous life-tenant, Hiravahu. It is contended that the gift to Jivibai, and after her to her lineal descendants, if any, is an absolute gift and that therefore, S. 111 applies. But, in the first place, the expression "shall accrue to Jivibai on the following conditions" shows the intention was not to confer an absolute estate. And, in the second place, Cl. 9 expressly says Jivibai shall have a life interest. In the third place, the testator was a Hindu and it is very unlikely that he intended to confer an absolute estate on a woman who had passed out of his family by marriage.

The Charity, therefore, is entitled to the Ramdas Mala.

Next, as to the wives' khata and the surplus of the Punji. The absolute bequest to Hiravahu of these properties in Cls. 7 and 5 (b) of Hansraj's will is reduced by Cl. 9 of the will by the following words:

"In like manner as regards the several sums

(5) A. I. R. 1915 P. O. 101=43 Cal. 482=43 I. A. 12=34 I. C. 892 (P. O.).

which I have directed to be paid in cash to my wife Hira, if she should not have dealt with (or disposed of) the same, and if Jivibai should get the same, and if Jivibai also should not have in her lifetime appropriated the same to her own use, then those sums also shall form part of this Anathashram fund."

Hiravahu has a life-estate with power of disposition during her lifetime and after her Jivibai, and if neither of them exercise that power, the property goes to the Charity. Hiravahu had therefore no power to dispose of the surplus Punji and wives' Khata by will and these must go to the Charity.

Stridhan and household effects are not cash and therefore not affected by Cl. 9 of Hansraj's will. Hiravahu was entitled to dispose of them by her own will. By Cl. 14 she has given them to Jivibai absolutely. But those are out down by C. 31 of her will which is as follows:

"I direct the properties bequeathed to Jivibai by this will with full power and control are bequeathed on this condition that the same shall not descend to her heirs in case she dies issueless but shall go to the funds for the destitute."

The fund of the destitute is Anathashrama Charity. This is a defeasance clause and it is contended that it is inoperative as this part of the will is not governed by the Hindu Wills Act and S. 118, Succession Act, has therefore no application.

But it is settled law that it is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingent on the happening of a future event: *Kristoromoni Dasi v. Narendro Krishna Bahadur* (6) It is not the case of a repugnant condition attached to an absolute gift. This clause is therefore valid, and by virtue of it the Charity is entitled to the stridhan and household effects.

I therefore find on the issues:

(1) What is the interest of the Charity under the two wills of Hiravahu and Hansraj Ludha?

Under the will of Hansraj, the Charity is entitled to the Ramdas Mala, the wives' Khata and the surplus of the Punji, and under the will of Hiravahu to the stridhan and household effects.

(2) What interest did Jivibai take in the mala under the will of Hansraj after the death of Hiravahu.

A life interest after the death of Hiravahu.

(3) Whether on the true construction of the will of Hansraj and in the events that have happened defendant 2 became entitled to the mala as the heir of Jivibai.

(6) [1889] 16 Cal. 333=16 I. A. 29=5 Sar. 285 (P. C.).

In the negative.

(4) Whether the conditions in Cl. 31 of the Will of Hiravahu are valid and operative in law?
In the affirmative.

(5) Whether the defendant 2 in the events that have happened became entitled to all the stridhan ornaments in Bombay and Jamnagar and all the household furniture mentioned in the will of Hansraj?

In the negative.

(6) Whether the claim of defendant 2, if any, in the said estate is not barred by the law of limitation.

Unnecessary.

As the Charity is to be administered in Jamnagar, I do not frame a scheme.

Decree therefore declaring that the Charity is entitled to the Vithaldas Ramdas Mala, the balance of the Punji, the wives' khata, stridhan and house hold furniture. Defendant 1 to render an account of his administration of the trust properties and to pass his accounts before the Commissioner. Costs of all parties as between attorney and client to come out of the trust funds.

G.P./R.K.

Suit decreed.

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MACLEOD, C. J. AND HEATON, J.

Nowroji Pudumji and others—Appellants.

v.

Laxman Moreshwar Deshpande and another—Respondents.

First Appeals Nos. 42, 48 and 49 of 1919, Decided on 12th November 1919, from order of Dist. Judge, Poona, in Misc. Appln. No. 24 of 1919.

Companies Act (7 of 1913), Ss. 196 and 215—Court can allow liquidator to question and examine persons connected with Company as to its management or formation.

Under S. 215, a voluntary liquidator is entitled to ask the Court for an order for the examination of persons, who were connected with the Company, with regard to its management or formation, and the Court has power to make such an order. [P 284 C 2]

Campbell, Kanga, Sayani & Co., Bahadurji and S. R. Bakhale—for Appellants.

B. J. Desai and J. B. Gharpure—for Respondents.

Macleod, C. J.—The applicants in this case presented a petition to the District Judge of Poona, stating that they were Honorary Liquidators of the Decan Bank, Limited, Poona, under voluntary liquidation, and asking for the examination of certain persons who were Directors, Managers and other Officers of the Company with respect to their conduct of the business of the Company and

as to their conduct and dealing as Directors, Managers and other officers thereof during the years in which they acted as such Directors, Managers, etc. There were originally nine respondents. The learned District Judge made an order for the examination of respondents 1 to 4. Against that order respondents 1, 2 and 3 have appealed.

The first question is whether a voluntary liquidator can apply to the Court for an order for the examination of persons connected with the management of the Company. S. 215, Companies Act says:

"Where a Company is being wound up voluntarily, the liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up, or to exercise as respects the enforcing of calls, or any other matters, all or any of the powers which the Court might exercise if the Company were being wound up by the Court."

Sub-S. (2) says:

"The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as the Court thinks fit or may make such other order on the application as the Court thinks just."

It has been argued by the appellants that that section does not give the Court power to make an order on the application of a voluntary liquidator, for the examination of persons who were connected with the Company, with regard to its management or formation. It is difficult to see where the basis of that argument lies. S. 215 is framed in the very widest terms. It enables the Court to make any order, which it might have made in a compulsory winding up in favour of a voluntary liquidator, if it thinks that the exercise of that power is just or beneficial. It seems to me it is quite useless to refer to any other sections of the Act in order that we may give its proper meaning to S. 215. There is no ambiguity whatever in that section. Therefore I am very clearly of opinion that a voluntary liquidator is entitled to come to the Court and ask the Court to make an order for the examination of witnesses, which the Court may make on the application of an official liquidator under S. 196 of the Act.

The second question is whether the Court ought to have made the order in this particular case. Now the liquidation began in 1916, and apparently has proceeded in very unfortunate circum-

stances for the Company, for instance, as the learned Judge in the Court below has stated, the liquidators have been trying to bring on this application for the examination of Directors and other persons for a considerable time, but owing to the unfortunate deaths of two successive liquidators and other reasons this matter has remained unsettled. In January of this year a suit had to be filed by the liquidators against certain persons including the present appellants for misfeasance, and it has been argued that this order ought not to have been made for the examination of the appellants because that suit had been filed. But it is quite clear that if the Judge had power to make the order at any time after the liquidation commenced, if the liquidator had been able to bring the application before him, there is no reason why the Judge should not have granted the order when he made it in February, merely because the suit had been filed against these opponents, which no doubt was filed to save the bar of limitation. It is quite true that in some cases the Court will not exercise its discretion in favour of the liquidator, if it thinks he is asking the Court to exercise its power without sufficient reason. But that is a pure question of discretion, and it is impossible to lay down any definite rules as regards the exercise of that discretion more than this, that the Court must exercise its discretion. The learned District Judge has considered this question in his judgment, and I agree that he was right in considering that the objection of the opponents, the present appellants, that the order ought not to have been made for their examination ought not to succeed. It is really difficult to see why the Court should not make the order on the application of the voluntary liquidators, or why the appellants should shirk giving such information as they may have regarding their management of the affairs of this Company. In my opinion therefore the order of the learned District Judge was perfectly correct, and the appeal must be dismissed with costs.

Heaton, J.—I agree. I feel quite clear in my own mind that S. 215, Companies Act gives the power, and I really am not at present able to conceive any reason of importance why the Court should not have the power. Seeing that the Court has the power, then undoubtedly the

District Court would be in a better position to make up its mind whether the examination of the Directors ought to proceed than are we sitting here. The liquidation has come before the District Court in Poona. I suppose it is very likely to come before it again. That Court would be a good deal more conversant with the facts than we are.

The principal reason urged against allowing the examination of the Directors seems to me to be a reason for allowing that examination. If there is a suit filed, then the sooner the Directors are examined the better, and the fact that there is a suit makes it more urgent, not less urgent, that the examination should take place speedily; provided of course, as I assume it will be, the examination is made for the purpose of the liquidation.

G.P./R.K.

Appeal dismissed.

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MACLEOD, C. J.

The Karadeniz.

Case No. 3 of 1915, Decided on 9th June 1919.

(a) Alien Enemy—Commercial Domicile—Neutral subject having commercial domicile in enemy country with no intention to remove domicile even after long time—His vessel must be condemned as lawful prize.

Where it is found by a Prize Court that on outbreak of war a claimant who is a neutral subject had his commercial domicile in enemy territory and that at the time of the capture of the vessel and for a long time after he had no intention of removing that domicile to a neutral country, the vessel must be condemned as lawful prize. (*Case law discussed.*)

(b) Prize Court—Crown cannot prescribe law for Prize Court—It can however apply Orders in Council where Crown's rights are mitigated.

While the Crown cannot by Orders in Council prescribe or alter the law to be administered by a Court of Prize, the Court would act on Orders in Council in every case in which they amount to a mitigation of the Crown's rights in favour of the enemy or neutral, as the case may be.

[P 286 C 1]

Strangman and Nicholson—for the Government.

Mirza and Inverarity —for Claimant.

Judgment.—On 11th March 1915, I delivered a preliminary judgment in the matter of the SS. Karadeniz. I was then of opinion that I was bound by an Order in Council of 20th August 1914 to consider the Declaration of London as governing this case, that under Art. 57 of

the Declaration the neutral or enemy character of a vessel is determined by the flag she is entitled to fly, and that before the capture the Persian Government had recognized this vessel's right to fly the Persian Flag. That therefore, the vessel could not be condemned as lawful prize unless I was satisfied that in spite of the apparent validity of the transfer of the vessel to the claimant, the control of the vessel remained in the hands of the Turkish vendors. On the evidence there was considerable justification for my holding that there was an arrangement between the claimant and the vendors that the latter should retain the control of the vessel and use the transfer as a means of getting her to the nearest Turkish port under the Persian Flag, but the claimant asked to be allowed to produce further evidence regarding the bona fides of the transfer, so I directed the cause to stand over for further proof. Some further evidence has now been taken in England on commission, but owing to the continuance of hostilities the claimant has been unable to procure the evidence he wanted from Constantinople. However owing to a recent decision of the Privy Council the Government have asked me to set down the cause for further argument, and I have heard the arguments of counsel on the question whether the vessel should not be condemned as lawful prize on the ground that the commercial domicile of the claimant at the time of the capture was Turkish. Their Lordships of the Privy Council held in *The Zamora* (1), that while the Crown cannot by Orders in Council prescribe or alter the law to be administered by a Court of Prize, the Court would act on Orders in Council in every case in which they amount to a mitigation of the Crown's rights in favour of the enemy or neutral, as the case may be.

Then, in *The Proton* (2) the question arose whether Art. 57 of the Declaration of London, which it was declared by the Declaration of London, Order in Council No. 2 of 1914 should be adopted and put in force, prescribed the law to be administered by a Court of Prize or directed that the rights of the Crown were to be

mitigated in favour of a neutral or of the enemy. The judgment says:

"In their Lordships' opinion the former is the effect of the article. It declares that a Court of Prize shall determine the character by one single circumstance, the character of the flag which she is entitled to fly and not by the entire body of relevant circumstances, which determine the truth as to that character. This is a positive prescription as to a material part of the law of evidence. The terms of this article are little adapted to a waiver of His Majesty's rights in favour of others; they clearly purport to prescribe the law on a topic which has been the subject of many decisions."

In my previous judgment I said:

"But for the change effected by Art. 57 there would have been no difficulty in deciding this case. According to the authorities the claimant at the outbreak of hostilities for the purpose of Prize Law would be considered a Turkish subject by reason of his mercantile domicile, unless within a reasonable time he transferred himself and his property to another country: see *The Ariel* (3). But this he had no intention of doing. It was by mere chance that he was at Piræus when the war broke out, and in his evidence he said that he intended to go back as soon as the Dardanelles were open to look after his business. It was immaterial to him whether war was going on or not."

I have now been asked by counsel for the claimant to reconsider the opinion I then expressed regarding the commercial domicile of the claimant, when the question was one of mere academical interest, while counsel for Government contend that on the authority of *The Proton* (2) it is clear that the vessel must be condemned unless I can come to a different conclusion. I am not prepared to say now that the question is so free from difficulty as I thought it was when I delivered my first judgment.

However, it has been argued for the claimant that I definitely decided that I was bound by the Order in Council and that it is not open to me to reconsider the case in the light of the judgment of the Privy Council in *The Proton* (2). I think I am entitled, before final judgment is given, either condemning or releasing the vessel, to reconsider any opinion I have previously expressed.

The Hague Convention does not apply to this case, as it was not ratified by Turkey. If then I can find that the Karadeniz bore an enemy character, she must be condemned. I shall now consider the authorities on that point.

"If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character and a subject of the enemy

(1) [1916] 2 A. C. 77=85 L. J. P. 89=2 P. C. 1=114 L. T. 626=60 S. J. 416=32 T.L.R. 436 (P. C.).

(2) [1918] A. C. 578=87 L. J. P. C. 114.

(3) [1857] 2 English Prize Cases 600.

country, in regard to his commercial transaction, connected with that establishment: "Kent's International Law, p. 217.

In *The Indian Chief* (4) it was laid down by Sir William Scott that for all commercial purposes the domicile of the party without reference to the place of birth becomes the test of national character. The character that is gained by residence ceases by nonresidence and is an adventitious one, no longer adhering to the subject of it from the moment he puts himself in motion to quit the country *sine animo revertendi*.

Therefore Kent says that the most important test is the *animus manendi*.

In *The Gerasimo* (5) it was laid down that:

"The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country."

The property of a person not resident in enemy territory may acquire a hostile character.

In *The Jonge Klassina* (6) a claim was made by a Mr. Ravie, describing himself as Ravie of Birmingham, to certain goods coming to be imported from Holland under the authority of a license. Ravie had been to Amsterdam in connexion with the export of the goods and the Court ordered their confiscation on the ground that it appeared from the evidence that Ravie had been as substantially employed in the trade of Amsterdam as any other mercantile firm of that place.

In *The Ann* (7) the ship under American colours was seized in the river Thames on 1st August 1812. A claim was made by the master who was also sole owner of the ship, describing himself to be a British subject and as such entitled to the benefit of an Order in Council of November 1812 directing the restitution of British ships under the American Flag. The claimant said he was born in Falkirk in Scotland, that during the last seven years he had been chiefly at sea but when at home he had lived and still lived at Bathgate in the

Shire of Linlithgow, where his wife and family were; that he was a British subject but that about 16 years ago he had been admitted a citizen of the United States of America for the purpose of commerce only. The Court said:

"Why this transaction is for the purpose of commerce: According to his own account, then he ceased to be a British subject for commercial purposes."

Nor did the mere circumstance of leaving his wife and family in Scotland avail him for the purpose of retaining the benefit of his national character.

In the leading American case of *The Venus, Rae, Master* (8) the decisions of the English Courts on the subject of national character acquired by residence and on the consequences of such acquired character were recognized as being founded on sound principles of public law:

"As a consequence of the doctrine of domicile the Court decided (by a majority) that if a citizen of the United States should establish his commercial domicile in a foreign country, and hostilities should afterwards break out between that country and the United States, his property shipped before knowledge of the war, and while that domicile continued, would be liable to capture, on the ground that his permanent residence had stamped him with the national character of that country. . . . The doctrine of enemy's property, arising from a domicile in an enemy's country, is taken strictly; and equitable qualifications of the rule are generally disallowed, for the sake of preventing frauds on belligerent rights, and to give the rule more precision and certainty:" Kent's International Law, p. 223.

In *The Eumaeus* (9), decided in November 1915, Sir Samuel Evans said that Professor Dicey's definition of "commercial domicile" as such residence in a country for the purpose of trading as makes a person's trade or business contribute to or form part of the resources of such country and renders it therefore reasonable that the hostile, friendly or neutral character should be determined by reference to the character of such country, was sufficiently clear and accurate for practical purposes.

It must be noted however that a person who has an interest in a house of trade in one country, although not resident there is sometimes said to have a commercial domicile in that country and a personal domicile in the country in which he resides: See *The Anglo-Mexican* (10):

(4) [1800] 3 Rob. 12.

(5) [1857] 11 Moore P. C. 88=5 W. R. 450=14 E. R. 628. (P. C.).

(6) [1804] 5 Rob. 297.

(7) [1813] 1 Dod. 221.

(8) [1814] 8 Cranch 251=3 Law. Ed. 13 U. S. 553.

(9) [1915] 1 Br. & Col. P. C. 605=60 S. J. 605=32 T. L. R. 125.

(10) [1918] A. C. 422, 433, 434.

"Again, it seems clear that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business. He acquires by virtue of the business a commercial domicile in the country in or from which the business is carried on, and this commercial domicile though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character."

From the opinion of the majority in *The Venus, Rae, Master* (8) Marshall, C. J., dissented, contending that a commercial domicile wholly acquired in time of peace ceases at the commencement of hostilities, that the presumption of an intention to return to the native country at the first opportunity is to be entertained and that this presumption ought to shield the property from condemnation until delay or circumstances destroy that presumption. If then property of a neutral with a commercial domicile in belligerent territory is liable to capture although shipped before the outbreak of war, it would follow that a ship belonging to such a neutral, if captured at sea or in port on the outbreak of war would be liable to be treated as an enemy ship, although the owner may have had no opportunity of absolutely relinquishing his commercial domicile.

I have searched through some hundreds of decisions of the Prize Courts of the Allies during this war in the hopes of finding a case the facts of which were in any way approximate to the facts in this case, but without success. *The Venus, Rae, Master* (8) was referred to by Sir Samuel Evans in the case of *The Manningtry* (11) decided in October 1915. Certain goods had been shipped before the outbreak of war by a partnership of four members, three of whom were in the position of British subjects and the fourth was a German subject. The place of business was in Germany. The President said:

"The question to be determined would be what the position was in the circumstances of this case with regard to the right of capture or seizure of the goods at sea after the commencement of hostilities. If a subject of a belligerent or a neutral had a business in hostile territory at the outbreak of war, and resided there, he would, according to international law, have a commercial domicile there, and his goods would be subject to capture at sea after hostilities, although shipped before the war, [*The Venus, Rae, Master* (8)]. Apart from a commercial domicile by residence, the property of a person may ac-

quire a hostile character, independently of his national character or his personal residence. If a person be a partner in a house of trade in an enemy's country, he is, as to the concerns and trade of that house, deemed an enemy: Pratt's Edn. of Story, p. 60; and the property of the house of trade established in an enemy country is considered liable to capture and condemnation as prize: Wheaton, Inter. Law, Edn. 4 (1904), S. 334. The rule is succinctly stated by Story, J., in *The Friendship* (12). It has been long since decided in the Courts of Admiralty that the property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the domicile of the partners. The trade of such a house is deemed essentially a hostile trade and the property engaged in it is therefore treated as enemy's property, notwithstanding the neutral domicile of any of the company. But it seems also to be settled that in such cases confiscation will not take place at the commencement of war, if the trade has been carried on during peace, unless the person affected continues his connexion with the trade after the war: Pratt's Edn. of Story, p. 61. *The Vigilantia* (13). It is not easy to see why, in the case of a partner in a hostile house of trade time should be given to sever connexion after war before confiscation by capture at sea is permitted, when no such opportunity is given to a person having a commercial domicile by residence in hostile territory. But I accept the law as it stands."

In his dissenting judgment in *The Venus, Rae, Master* (8) Marshall, C. J., discussed how a commercial domicile might be terminated. He said:

"If a British subject, residing abroad for commercial purposes, takes decided measures, on the breaking out of war, for returning to his native country"

and again

"An immediate discontinuance of trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicile."

In *The Manningtry* (11) the President decided that the British partners had not taken immediate steps, as their duty was at the outbreak of war, to divert the goods from reaching Germany, and condemned their shares. If they had been neutral the case would have been different.

"The question turns upon the stage at which in the case of a pre-war shipment a neutral partner in an enemy house of trade ceases to have his share in the partnership property protected from confiscation.... One test would be whether the neutral partner has done anything actively after the commencement of hostilities to further or facilitate the delivery of the goods to the enemy house. If the neutral does no act after the war in regard to the goods, but merely allows them to proceed in the ordinary

(12) [1819] 4 Wheat. 105=4 Law Ed. 17 U. S. 525.

(13) 1 C. Rob. 1.

(11) [1916] P. 329=1 P. C. 497=60 S. J. 75=32 T. L. R. 36.

course, I find it difficult to hold that his share in the goods innocently shipped should be forfeited. He has no duty in regard to the goods towards the belligerent State to stop their delivery because he has an undivided share in them. His situation appears to me to differ in that respect from that of a partner who is a subject of the belligerent State. *The Anglo Mexican* (14)."

It would also seem that in the President's opinion a British subject carrying on a business in Germany, but not resident there, would be allowed an opportunity to sever his connexion as he cites with approval a passage from Calvo, Vol. 4, S. 1937, p. 70:

"According to these principles, if a merchant domiciled in a neutral country does not take at the commencement of the war immediate measures for withdrawing his goods from a commerce which has no longer a neutral character and to which he could legitimately attend in time of peace in the country of a belligerent, he cannot guarantee his goods from capture and from hostile confiscation by alleging that personally he resides in a neutral country."

In these days there would no doubt be difficulties placed in the way of withdrawing property, but I presume from this passage that if a British or a neutral subject engaged in trade in Germany at the outbreak of the war in August 1914, but not resident there had goods at sea belonging to that trade, they would not be liable to capture and confiscation, provided the owner had taken such immediate steps as were open to him to divert the goods from that trade.

These questions were discussed by Judge Cator in the case of *The Lutzow* (No. 4), (15) before the Egyptian Prize Court in March 1916.

The *Lutzow* was a German ship which was captured and condemned as prize. A claim was made to certain goods on board her by the American Trading Company which had a branch in Hamburg. The goods had been bought by the Hamburg branch and had been shipped for transmission to another branch at Kobe. It was held that at the time of the capture the ownership was in the Hamburg branch and the goods were therefore to be treated as *prima facie* belonging to an enemy. The learned Judge criticized adversely the law as laid down by the majority of the Court in *The Venus, Rae Master* (8). He referred to *The Ocean* (16),

(14) [1916] P. 112 = 85 L. J. P. 148 = 2 P. O. 80 = 114 L. T. 807 = 60 S. J. 418.

(15) [1916] 2 Br. & Col. P. O. 122.

(16) [1804] 5 C. Rob. 90

in which a British subject settled as a partner in a house of trade in Holland had made arrangements for dissolution but was only prevented from removing personally by the violent detention of all British subjects who happened to be within enemy territories at the breaking out of war. Sir William Scott said:

"It would I think under these circumstances be going farther than the principle of law requires, to conclude this person, by his former occupation, and by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities by the means which he had used for his removal."

Judge Cator remarks: "This... was the case of a partnership, but Sir William Scott makes no point of that fact." Again *The Venus, Rae, Master* (8) "declares that the supposed right of election on the outbreak of war does not exist." "This doctrine," it says, "is believed to be as unfounded in reason and justice as it is in law." But the learned Judge declined to consider the decision in *The Venus, Rae, Master* (8) good law. He concludes:

"No one can wish to inflict needless hardship on British subjects or on neutrals, and if on the outbreak of war a non-enemy, be he neutral or British resident or non-resident, promptly closes his business and morely takes the steps necessary to remove his own property from the enemy country, I think he is entitled to do so."

The learned Judge further expressed the opinion that Sir Samuel Evans in *The Manningtry* (11) had not approved of the decision in *The Venus, Rae, Master* (8), but from the passage I have underlined (italicized) above, (Supra p. 288), it would appear that the President felt himself bound to accept the decision although he thought that there was a good deal to be said in favour of the dissenting judgment.

In May 1915 the Prize Court at Malta had to deal with the claim of one Hovaghmain to certain goods forming part of the cargo of the SS. *Erymanthos*, a German steamer, which was captured and condemned as prize. The claimant was an Egyptian subject and a sleeping partner in a firm at Alexandria, but he was domiciled and carried on business in Constantinople. On the outbreak of war he left Constantinople and came to reside in a neutral country. The Court expressed the opinion that he was not to be treated as an enemy subject. The

facts of the case are not very fully set out on the record, but if, as it seems, the goods were consigned to the claimant at Alexandria, the Court may have considered that they did not belong to the trade carried on in enemy territory.

The decision of Judge Cator was reversed on appeal by the Privy Council [*The Lutzow* (17)] on the ground that the goods had been ordered by and belonged to the Japanese branch. Their Lordships said at p. 441:

"On the outbreak of war the appellants were entitled to save themselves from being treated by Great Britain and her Allies as an enemy in respect of their German branch by promptly ceasing to carry on trade in Germany, and if for the purpose of doing so they removed from Germany by sea any property they then had in Germany, it would during its transit for that purpose be free from seizure and condemnation as enemy property."

In *The Anglo-Mexican* (10) a claim was made by a naturalised American who had a one-fifth share in a German partnership. Their Lordships said at p. 425:

"An acquired domicile may be abandoned, and if prior to the actual capture the owner has already done some unequivocal act indicating an abandonment of his acquired domicile in the country of the enemy, the goods will *prima facie* be treated as belonging to a neutral. It has been sometimes urged that neutrals, resident in a country which by the outbreak of hostilities becomes an enemy country, ought to be allowed a reasonable time after such outbreak to elect whether they will abandon or retain their acquired domicile. This point was discussed in *The Venus, Rae, Master* (8). In that case the majority of the Judges of the Supreme Court of the United States decided against allowing any interval for election. The English authorities are not conclusive one way or the other. The point does not however fall to be determined on this appeal, for the respondent was not at the outbreak of hostilities permanently resident in Germany."

Their Lordships also said:

"If (a neutral not resident), having such a commercial domicile in a country which by the outbreak of war becomes an enemy country, he desires to avoid the consequences entailed by such domicile, he may avail himself of the interval allowed by law to discontinue or dissociate himself from the business in question. Inasmuch, however as goods at sea, when the war commenced, may be captured before such reasonable interval has elapsed, the Court will in a proper case take notice of a discontinuance or dissociation taking place after the capture, or will even adjourn proceedings in the Prize Court, to give an opportunity for such discontinuance or dissociation."

There are therefore four classes of neutrals who may be engaged in trade in enemy territory on the outbreak of war:

1. Resident; 2. Nonresident; 3. Resident and partners with enemy subjects; and 4. Nonresident and partners with enemy subjects.

The property of class 1 would be liable to capture at sea and confiscation on the outbreak of war if the decision in *The Venus, Rae, Master* (8) must be followed, but the decision of the Privy Council in *The Gerasimo* (5) seems to lay down the opposite view and allow such a neutral a right of election. The property of class 2 would not be liable, provided the claimant took immediate steps on the outbreak of war to prevent it reaching enemy territory.

In classes 3 and 4 there seems to be a distinction according as the claimant is a subject of the other belligerent country or of a neutral country.

In the case of the former, a British subject at any rate is bound to take immediate steps to divert the goods from reaching enemy territory.

In the case of the latter, if in class 4, he is only bound to refrain from taking any active steps to enable the goods to reach enemy territory. If in class 3 I presume his duty would be the same, though I have not found any decision on the point.

Now the present claimant as regards the Karadeniz, which was his own private property, clearly comes within class 1, unless the fact that he was by accident temporarily residing in Greece at the outbreak of war can bring him within class 2, such a question as far as my researches have gone, has not been discussed before. It seems to me just possible that a Court of Prize guided by principles of equity might decide in favour of such a claimant, even if it held that he came within class 1, provided he took immediate steps to announce his intention of abandoning his enemy domicile and to prevent the goods from reaching enemy territory.

It cannot be disputed that on the outbreak of war with Turkey the claimant's commercial domicile was Turkish. He was born in Constantinople, he had always resided and carried on business there. About 1912 he became a Persian subject in order to free his children from the obligation to serve in the Turkish army, but that made no difference to the way in which his business was conducted. He left Constantinople on 21st October

for Piræus because he had heard that one of his ships had been damaged there in a collision, but up to 5th November he had disclosed no intention of giving up his business in Constantinople. When war broke out, he sent a man to Constantinople to remove his wife and family as he was afraid for their safety because they were Greeks, and they arrived at Piræus about 13th or 14th November, but that by itself would not constitute a step towards getting rid of his commercial domicile in Turkey: see *The Ann* (7).

He said in examination-in-chief that he did not intend to go back to Constantinople as long as the present Government was in power. In cross-examination he said:

"I object to the Young Turks' Government. I shall go back as soon as the Dardanelles are opened. It is immaterial to me whether war is going on or not I want to go to look after my business."

It was suggested that as the evidence was given on 23rd February, two or three days after the Allied Naval Forces had commenced an attack on the Dardanelles that the claimant was referring to the possibility of the forcing of the Straits and the capture of Constantinople by the Allies, but I do not think the claimant can be considered as meaning anything more than that he wanted to get back to Constantinople as soon as he could. Then in re-examination he said:

"If I got to Constantinople I would try and get my ships to Piræus. I have some immovable property and some cash there (Constantinople). I don't want to trade there while war continues."

The claimant had a partner called Bachrato, a Turkish subject, in Constantinople who was looking after the agency business with reference to the other steamers in which the claimant had an interest, and if the Karadeniz had not been seized in Bombay, there is no certainty that the claimant would not have returned to Constantinople, or, if he had elected to remain at Piræus, that he would not have continued to direct the business at Constantinople from there.

The difficulty of the case lies in the fact that it may be said that he came within class 2 above, and that he had no opportunity after the declaration of war, when he happened to be in Greece, of making his election to retain or renounce his commercial domicile. It may well be that finding himself outside Turkey, and recognizing the impossibility of remov-

ing his property from Turkish jurisdiction, he might have decided on carrying on such business as he could with the ships under his control outside Turkish limits, and it might, therefore, be conceded that thus he would have done everything in his power, which the Law of Nations required, to give up his commercial domicile in Turkey so as to render immune from capture property connected with a business carried on without the limits of Turkish territory. What importance is to be attached to his answer in re-examination? His objection to the Turkish Government must have been one of very recent growth, as he had made no attempt to remove himself from subjection to it before November 1914. In an unguarded moment he said in cross-examination he wanted to go back to look after his business, *not to remove it*; it did not matter to him whether a war was going on or not. Then he saw his mistake and said that if he got to Constantinople he would try and get his ship to Piræus.

Against that there was the undeniable anxiety of the claimant, as soon as he had bought the ship, to get her out of Bombay to Busrah, a Turkish port. On 16th and 19th November he got telegrams dispatched from Piræus inquiring whether the ship had left for Busrah. Is that consistent with an intention after the outbreak of war to remove his property as far as possible from Turkish territory? Does it not rather point to the fact that his after-expressed intention was influenced by the ship not having been able to proceed to Busrah and having been captured in Bombay? Is there anything to lead me to suppose that if the ship had got to Busrah, the claimant would have done anything to get rid of his commercial domicile in Turkey? Can it be said that the claimant was *sine animo revertendi*? On the best consideration that I can give to these questions I have come to the conclusion that on the outbreak of war the claimant had his commercial domicile in Turkey, and that at the time of the capture and for many months after he had no intention of removing that domicile to a neutral country. Nothing is said in the claimant's petition of 15th January 1915 regarding any such intention. The only evidence now is the claimant's statement made before me, at a time when it was

clearly influenced by the events which had happened and made in contradiction to his evidence already given. Therefore even if the claimant can be considered as belonging to class 2, he has not proved what it was necessary for him to prove in order to save the ship.

If *The Venus, Rae, Master* (8) is not to be followed, and no distinction can be drawn between Classes 1 and 2, both having a right to elect, the result will be the same.

If the claimant on the outbreak of war had directed that the ship should remain in Bombay and had announced that he dissociated himself entirely from his business in Turkey, leaving the question of his being able to remove his property from Turkish territory to depend on the attitude of the Turkish Government, I do not think it would have been according to the law administered by Prize Courts to condemn the ship. But the claimant did absolutely nothing towards abandoning or denouncing his Turkish domicile. He does not come within the scope of the judgment of Marshall, C. J., in *The Venus, Rae, Master* (8), when he said:

"there must be an immediate discontinuance of trade and arrangements for removing followed by actual removal within a reasonable time."

Therefore in my opinion on the best consideration I can give to this very difficult case the ship must be condemned as lawful prize. This decision whether reversed or upheld on appeal, still leaves open the question whether the transfer to the claimant was made in good faith.

G.P./R K.

Vessel condemned.

A. I. R. 1920 Bombay 292

SHAH AND HAYWARD, JJ.

In re *Jesa Bhatha*—Petitioner.

Criminal Revn. Appln. No. 322 of 1919, Decided on 20th October 1919, from order of Sub-Divl. Magistrate, 1st Class, Kaira.

(a) Criminal P. C. (5 of 1898), S. 122—Object of asking security is prevention of crime and not imprisonment.

The object of an order for furnishing security for good behaviour is the prevention of crime, and not to secure the imprisonment of the person concerned. [P 293 C 1, 2]

(b) Criminal P. C. (5 of 1898), S. 122—Refusal to accept surety must be based on sound judicial reasons—Surety living at great distance is no ground for refusal.

Under S. 122, Criminal P. C. when a surety or good behaviour is offered, the Magistrate is

required to consider the matter judicially, and to state his reasons for not accepting a surety.

The mere fact that the sureties offered, although solvent and respectable, live at a distance from the persons bound over is not a good reason for refusing to accept them. [P 293 C 1]

H. V. Divatia—for Petitioners.

S. S. Patkar—for the Crown.

Shah, J.—In this case seven persons, including Dhula Bhatha and Mangal Chuna, were ordered by the Sub-Divisional Magistrate on 18th December 1918 to execute a personal recognizance for Rs. 100 and to furnish two solvent and respectable sureties for the same amount each for good behaviour for a period of one year. On the same day they were ordered to suffer rigorous imprisonment for one year or until within such period the security required was furnished, as no sureties were furnished by the persons concerned on that day. On 16th April last an application was made by the relations of these two persons, Dhula and Mangal, offering the necessary sureties on their behalf. The persons offered as sureties were two brothers, Parshotam and Gangashankar. The Sub-Divisional Magistrate referred the matter to the Police and on 3rd May last a report was made by the Sub-Inspector of Umreth that the sureties offered had land in the village of Araj, and that they were ordinary men. The matter was further referred to the Sub-Inspector of Police at Dakore, who made a report on 12th June last that the persons concerned had land at Araj and that they intended to employ the two persons, Dhula and Mangal, to work on their fields, that the sureties lived at Umreth and were not in a position to exercise control over the two persons, that the outlaws, for harbouring whom Dhula and Mangal along with others were called upon to furnish security for good behaviour, were still at large and that it was desirable not to accept any sureties until those outlaws were arrested. On this correspondence an order addressed to the Sub-Inspector was endorsed by the Sub-Divisional Magistrate in Gujarati on 5th July as follows:

"Under the circumstances stated by you bail cannot be granted. Please inform the applicants to that effect and report."

The relations of the two persons made an application against the said order to the District Magistrate, who refused to interfere. They have made an applica-

tion now to this Court. At the outset I desire to point out that this application should have been filed in the names of the persons concerned. In view of the fact that the order now in question was made on the application of the present petitioners, we do not consider it necessary to postpone the matter in order to have the application formally in the names of the two persons concerned. The matter has been brought to our notice, and it seems desirable to make the proper order without any further delay.

It is clear that according to the order made by him on 18th December 1918 the Sub-Divisional Magistrate had to inquire whether the two sureties offered were solvent and respectable. Under S. 122 he could refuse to accept these sureties if they were unfit persons for reasons to be recorded. In the present case I cannot accept the conclusion reached by the Sub-Divisional Magistrate, nor can I approve of the procedure followed by him. The materials before the Sub-Divisional Magistrate clearly showed that the sureties offered were solvent persons. There was nothing against them and they were apparently respectable persons. The other reason given in the Police report for not accepting them was that the persons in jail should not be released until the outlaws were arrested. It is hardly a reason for not accepting these sureties. The Sub-Divisional Magistrate has simply endorsed the report made by the Police. He has given no reasons of his own, and having regard to the state of the original papers in this case it seems to me that he has not treated the matter judicially. Under S. 122 when a surety is offered, the Magistrate is required to consider the matter judicially and to state his reasons for not accepting a surety. In the present case he has failed to do so. He does not seem to have realised that according to his previous order he had only to consider whether the sureties were solvent and respectable and he took a little over two months and a half to decide this simple question.

The District Magistrate recognized the defects in the order but refused to interfere on the ground that he doubted whether the sureties offered were of sufficient standing. It seems to me that that reason is vague. In dealing with the question of sureties under S. 122 it must be remembered that the object of the

order for furnishing security for good behaviour is the prevention of crime and not to secure imprisonment of the persons concerned: see *Jivanatha v. Emperor* (1). The report of the Sub-Inspector of Police clearly shows that he has put forward a reason for not accepting sureties which really has the effect of diverting the preventive provisions to a punitive purpose. I am of opinion that the Sub-Divisional Magistrate was clearly wrong in accepting such a reason and that the sureties offered ought to be accepted in this case.

I would accordingly make the rule absolute, set aside the order of the Sub-Divisional Magistrate, and order that the sureties may be accepted.

Hayward, J.—I agree. The acceptance of the sureties ought to be ordered. It was directed in the preliminary order that two solvent and respectable sureties for Rs. 100 each should be furnished. Two sureties named Gangashankar and Parshotam were produced. They were reported to be solvent and respectable. They owned houses and lands and they were prepared to employ the persons required to give sureties upon their land. It was however suggested that they would not be satisfactory sureties, as the lands were at a place called Araj which would appear to be about six miles from their residence at Umreth. It was also suggested that it would be unwise to release the men from prison owing to the presence of outlaws in the neighbourhood. The sureties were therefore refused by the Sub-Divisional Magistrate, and though it was recognized that the refusal was not quite in order, it was not interfered with by the learned District Magistrate.

It seems to me that the discretion to refuse sureties was not properly exercised. The sureties were within the description of the sureties required. They would, in my opinion, have proved as satisfactory as any sureties to be offered in that they would have taken the men required to give sureties as their own tenants and would therefore have had good opportunity of preventing them from getting into mischief. The distance of six miles of the land from their residence would not seem to me to be really material in the *mofussil*. It was obviously no good reason in law to refuse

(1) A. I. R. 1914 Bom. 5=23 I. O. 476.

to release the men from prison that there happened to be other outlaws in the neighbourhood.

It seems to me necessary also to observe that the scrappy order in vernacular refusing the sureties gave no reasons whatever for the refusal, and to point out that an order refusing sureties ought to be passed as a judicial order upon proper materials and that it has been specifically provided that reasons for refusal should be recorded. These provisions have been overlooked by the Sub-Divisional Magistrate and ought to have been set right, if he had jurisdiction to do so, by the District Magistrate under S. 122, Criminal P. C. It seems to me desirable also to repeat that sureties for good behaviour and not imprisonment were the primary object of the preventive provisions of Ch. 8, Criminal P. C.

It is perhaps unnecessary to press the point, as the matter is before us and would seem to require the orders proposed, but it is unusual to proceed on petitions received merely from the relations of parties and should not be taken as a precedent under S. 439, Criminal P. C.

G.P./R.K. *Rule made absolute.*

A. I. R. 1920 Bombay 294

SCOTT, C. J. AND HAYWARD, J.

Valli Mahomed Abu—Defendant—Appellant.

v.

Berthold Reif — Plaintiff — Respondent.

Original Civil Appeal No 17 of 1918, Decided on 27th March 1919.

Alien—Enemy—Interest on debts due to aliens is not suspended from break of war to date of license to trade—Interest.

Where a debtor is under an obligation to pay interest to an enemy firm such obligation is not suspended between the date of the outbreak of war and the date when the firm is granted a license to conclude certain transactions.

[P 295 C 1]

Taraporevala and Desai—for Appellant.

Coltman and R. D. N. Wadia—for Respondent.

Judgment.—The only question to be decided on the cross objection is whether the learned Judge in the lower Court was right in holding that the defendant was entitled in the account between the parties to a refund of any interest paid between 10th August 1914 and 9th February

1915. The former date is taken as the date of the outbreak of war between England and Austria and the latter is the date when the first license was granted to the plaintiffs' representative in Bombay to conclude their indent transactions. These transactions were—so far as is indicated by the specimen indent put in—indents sent from Bombay to Bradford for goods from the plaintiffs' firm at that place. One of the plaintiffs, Reif, was a naturalised British subject. The partnership of the plaintiffs being between an Austrian and a naturalised Englishman was dissolved by the outbreak of war but the plaintiff Reif was granted a license under the Proclamation of the 9th September 1914 in England.

Whether any of the contracts to which the accounts between the parties relate were illegal having regard to the terms of this Proclamation, has not been established and the only question for consideration is as above stated, whether the obligation to pay interest was between certain dates suspended.

The learned Judge followed to a limited extent a previous judgment of Macleod, J., who thought the plaintiffs' Bombay firm was a branch of their Hamburg firm and held there was a suspension of the obligation to pay interest; he was of opinion that if the defendant had paid money due to the firm in Bombay he would not have been doing anything which involved a penalty but was entitled to withhold it until satisfied that it would be retained in safe custody till the suspension of hostilities. In so holding he applied certain American cases of which *Brown v. Hiatts* (1), a decision of the Supreme Court of the United States, is the weightiest. These decisions have however been questioned in *Hugh Stevenson & Sons v. Aktiengesellschaft Fur Cartonnagen-Industrie* (2) by several of the Law Lords: see pages 255, 259.

Moreover, in the Supreme Court of the United States it has been held that where the debtor resides in the same country as the creditor or his duly authorised agent, provided such agent was appointed before the war, interest on a debt is not suspended by the war: see *United States v. Grossmayer* (3) and *Ward v. Smith* (4)

(1) [1872] 15 Wall. 177=82 U. S. 21, p. 128.

(2) [1918] A. C. 239=37 L. J. K. B. 416.

(3) [1869] 9 Wall. 72=76 U. S. 19, p. 627.

(4) [1886] 7 Wall. 447=74 U. S. 19, p. 207.

In the present case the branch firm of the plaintiffs to whose representative the defendant paid interest was established long before the war.

We think the safest course is in the circumstances to give effect to the opinion indicated by the Lord Chancellor in *Hugh Stevenson & Sons' case* (2), that it is difficult to see on what principle interest (particularly where, as here, it is stipulated for by the contract) is to be forfeited if private property is to be respected.

In the present case it may be that even according to the proposition laid down by Macleod, J., the money paid was not wrongly paid and therefore, could not be recovered back.

We allow the cross-objection and delete the clause of the decree which varies the Commissioner's report.

The result is that the appeal is dismissed with costs and the cross-objection is allowed with costs.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1920 Bombay 295

MACLEOD, C. J. AND HEATON, J.

Natvarlal Girdharlal and others — Plaintiffs—Appellants.

v.

Ranchhod Bhagwandas and others — Defendants—Respondents.

First Appeal No. 173 of 1914, Decided on 28th August 1919, from decision of 1st Class Sub-Judge, Thana, in Suit No. 220 of 1912.

Hindu Law—Adoption—Widow—Power—Widow's power cannot be controlled by will made by father-in-law—Adopted son would still be grandson—His rights as grandson would not be affected by directions in will.

Whatever powers a Hindu widow may have under the Hindu law of adopting a son, these powers cannot be controlled by the will of her deceased father-in-law; if however she adopts a son contrary to the terms of the will that would affect his rights to take under the will as a *persona designata*, but would not in any way affect his right to be considered as the grandson of the testator under the adoption. [P 295 O 2, P 296 O 2]

Rangnekar, Motichand, Devidas & Co., Bhimji & Co., J. B. Metha and D. R. Manerikar—for Appellants.

P. B. Shingne, D. W. Pilgaokar, Ratanlal Ranchhoddas, B. J. Desai, Shroff Dinshaw & Co. and H. B. Mehta—for Respondents.

Macleod, C. J.—One Vithaldas and his son Bhagwandas were members of a Hindu joint family. Bhagwandas died in 1871 leaving a widow Ichhubai and a

daughter Bhikhibai. Vithaldas died in 1875, the sole surviving co-parcener.

On 3rd May 1875, he made a will. He left all his property, moveable and immovable, to his daughter-in-law Ichhubai for life. But he said :

"if she likes, she may take upon her lap an adopted son. In case a boy is adopted her adopted son will become the owner of the whole of my property."

At the end of the clause are the words: "in case Bhikhibai happens to have a son she (Ichhubai) should not take a boy in adoption."

Clause 3 is as follows :

"If Ichhubai happens to die without having taken a boy in adoption, then all that property mentioned in Cl. 1 shall after her death become of the ownership of Bhikhibai, the daughter of my deceased son Bhagwan by his first wife and the wife of Tribhawan Varjiwan and of the sons that may be born to her; no other kinsman whosoever shall have any claim, right or interest."

Ichhubai adopted a son in 1896, but at that time Bhikhibai had a son, the plaintiff in the case, born on 14th October 1891. After attaining his majority the plaintiff filed this suit against the adopted son, defendant 1, and various other defendants alleged to be in possession of the property of Vithaldas, praying that he should be put in possession of the plaintiff properties. The defendants denied the right of the plaintiff to inherit the property and urged that his claim was time-barred. The defendants other than defendant 1 relied upon alienations in their favour either by defendant 1 or by Ichhubai.

The learned Subordinate Judge found that the plaintiff was not entitled to inherit the property of Vithaldas as an heir under Hindu law, that he was not entitled to claim the property of Vithaldas as a donee under the will, and that the property of Vithaldas did not devolve to Bhikhibai under his will.

Accordingly he dismissed the suit with costs. From that decision the plaintiff has appealed to this Court. In the first place it is clear that whatever powers of adoption Ichhubai had under Hindu law, Vithaldas had no power to control them by his will. He could however leave his property to Ichhubai's adopted son as a *persona designata*, provided the adopted son was born in his lifetime. The words at the end of Cl. 1 of the will 'in case Bhikhibai happens to have a son she should not take a son in adoption' impose a condition that the adopted son must be adopted before Bhikhibai had a

son, in order to enable him to take under the will. It was just as if Ichhubai had a power to appoint, the power being defeated by the birth of a son to Bhikhibai. The above words do appear to have been written at the end of Cl. 1 as an afterthought, but we agree with the trial Court that it would not be safe to conclude that they were inserted after the will was executed.

Reading Cl. 3 it would seem that the testator first intended that Bhikhibai should take no interest if Ichhubai adopted a son. Then it may have occurred to him that he wanted his estate to go to Bhikhibai and her sons if she had any and that therefore the birth of a son to Bhikhibai should put an end to the right of Ichhubai to appoint a person who should take the estate, so the last sentence was added to Cl. 1.

As defendant 1 was adopted after Bhikhibai had a son, it is clear that he cannot take as a *persona designata* under the will.

Bhikhibai died in 1897 a few weeks before Ichhubai, and the right of the plaintiff to succeed to the estate after the death of Ichhubai depends on the question whether the remainder given to Bhikhibai by the will was vested or contingent.

It has been urged that the testator intended that Bhikhibai should have a vested remainder, liable to be divested if Ichhubai adopted a son before Bhikhibai had a son. But whatever the testator may have intended and although we must endeavour to give effect as far as possible to the testator's intentions, we are bound to construe the will according to well-established rules, and give the written words their plain grammatical meaning. The testator evidently had in his mind various contingencies, and unfortunately he did not obtain expert advice, so that the written words should express his intentions regarding the devolution of the estate, according as those contingencies might or might not happen. Moreover, his difficulties were increased by the fact, as I think that he changed his mind after he had written Cl. 3.

To enable a remainder to be vested there must be a direct gift. Without the words added to Cl. 1 it is clear that Bhikhibai only took a remainder contingent on Ichhubai dying without taking a son in adoption. But it has been urged that

on account of the added words in Cl. 1, we must read Cl. 3 as if it ran:

"if Ichhubai happens to die without having taken a boy in adoption who can take the estate under the condition mentioned in Cl. 1."

In any event those words would not create a vested remainder, but a remainder contingent on a son being born to Bhikhibai before Ichhubai adopted, or Ichhubai dying without having adopted. The only possible chance the plaintiff has of succeeding would be if his mother's contingent interest on his birth became a vested one. But it is impossible to read Cl. 3 in that way starting with the fact that on the death of the testator there was no direct gift of the remainder to Bhikhibai, but a gift contingent on the happening of an uncertain event, viz., the dying of Ichhubai without having taken a boy in adoption, I cannot say, in face of the fact that Ichhubai did adopt that the contingency mentioned in Cl. 3 has occurred.

The result must be that on the death of Ichhubai, as defendant 1 could not take, there was an intestacy.

The plaintiff urges that defendant 1 is excluded from the inheritance because his adoption was contrary to the terms of the will.

But that would only affect his rights to take under the will as *persona designata*, and would in no way affect his right to be considered as the grandson of Vithaldas under the adoption, which his mother undoubtedly had a right to make as a Hindu widow. But even if defendant 1 could not succeed, we are told, and it does not seem to be disputed that there are nearer heirs to Vithaldas than the plaintiff, who could only succeed as a *bandhu*. In my opinion therefore the decree of the lower Court must be confirmed and the appeal dismissed with costs.

Heaton, J.—I agree.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 296

HEATON AND MARTEN, JJ.

Mulchand Raichand—Defendant—Appellant.

v.

Gill & Co.—Plaintiffs—Respondents.

Original Civil Appeal No. 36 of 1919,
Decided on 31st July 1919.

(a) Civil P. C. (5 of 1908), S. 10 — Subject matter and parties must be identical.

Before an order staying a suit can be made under S. 10 there must be substantial identity between the matter in dispute in the second suit and the matter or some of the matter in dispute in the first; and there must be a similar substantial identity in the matter of parties.

[P 297 C 1]

(b) Civil P. C. (5 of 1908), O. 39, R. 1 — Judge sitting on original side can issue injunction restraining defendant from proceeding with another suit in mofussil Court if delay or embarrassment is likely to be caused.

A Judge sitting on the Original Side of the Bombay High Court has jurisdiction to issue an injunction restraining the defendant in a suit before the High Court from proceeding with a suit instituted by him in a mofussil Court in such a way as to delay or embarrass the trial of the suit in the High Court.

[P 298 C 1]

Desai—for Appellant.

Coltman—for Respondents.

Heaton, J.—A Bijapur firm filed a suit in the Court of the first class Sub-Judge at Bijapur against Gill & Co. of Bombay. Shortly afterwards Gill & Co. filed a suit in the High Court against the Bijapur firm. The latter applied that the proceedings in the High Court suit should be stayed under S. 10, Civil P. C., and Gill & Co. retorted by asking for an injunction restraining the Bijapur firm from proceeding with the suit in the Bijapur Court. The Judge of this Court, who heard the matter, held that S. 10, Civil P. C., did not apply and that an injunction should be issued as asked for by Gill & Co. He ordered accordingly, and the Bijapur firm have appealed.

If S. 10, Civil P. C., applies then the Bijapur suit must proceed, for it was first filed, and the High Court suit must be stayed. Does S. 10 apply? In order that it may apply, there must be substantial identity between the matter in dispute in the second suit and the matter or some of the matter in dispute in the first suit; and there must be a similar substantial identity in the matter of parties. There will be found cases where it is clear that the section applies and cases of doubt. This I think is a case of doubt, not a clear case. We have to decide the matter on a comparison of the two complaints, for there are no written statements on the record and no issues. The earlier suit is of a complicated character and may have to be greatly modified both as to parties and as to matter. The second suit is simple and undoubtedly the matter it relates to is

involved in the earlier suit. But it is so involved that it will have to be disentangled before the Bijapur suit can proceed. It might be disentangled by separating the dispute between the Bijapur firm and Gill & Co. from numerous other claims which do not concern the dispute with Gill & Co. It might be disentangled by omitting the latter altogether and confining the Bijapur suit to the other disputes or some or one of them. We do not know how it will be disentangled, so at the present stage I am not prepared to say that S. 10 does apply. I say this on a consideration of the circumstances of this particular dispute and not because I find any great difficulty in apprehending the general purpose of S. 10.

That being so, we have to consider whether the Judge had power to direct that the Bijapur firm should refrain from proceeding with the Bijapur suit. It seems to me to matter very little whether the injunction remains or is dissolved for even in the latter event, I feel very little doubt that the suit in the High Court will be finished before the suit in the Bijapur Court comes to trial. That however savours of prophecy; so we must consider the question whether the Judge had power to make the order. The point was not raised in the lower Court or in the memo. of appeal but it has been argued. The appellants' counsel admits that the Judge has complete jurisdiction over the High Court suit; he can try it and dispose of it. If so it seems to me that the Judge has complete jurisdiction to make all orders appropriate to the trial and progress of the suit. I am unable to understand on what principle he can have only a partial jurisdiction for that purpose. The English Law on the power of a Court of Equity to issue injunctions against persons outside the jurisdiction does not appear to limit the power, where it is to be used against a person who is properly a party to and freely contests the suit. The Calcutta cases to which we have been referred *Mungle Chand v. Gopal Ram* (1), *Vulcan Iron Works v. Bissumbhur Persad* (2) and *Jumna Dass v. Harcharan Dass* (3) were decided by single Judges and the decisions were not uniform. The Bombay case, *Narayan Vithal*

(1) [1907] 34 Cal. 101.

(2) [1909] 36 Cal. 283=1 I. C. 927

(3) [1911] 38 Cal. 405=11 I. C. 416.

Samant v. Jankibai Sitaram (4), only decides that a Judge sitting on the Original Side of the High Court cannot order a mofussil Court to stay proceedings, it leaves open the question whether he can order a party to the suit before him to refrain from prosecuting a suit in a mofussil Court.

Therefore it seems to me, we have to decide the point by reason and not by authority, for there is not a clear authority though the general trend of the English cases shows that a Judge has full power over the parties properly before him.

The Judge must have that amount of power over the parties which is essential to a prompt and complete disposal of the suit before him. If one of the parties can obtain the production of the accounts, documents, etc., in the Bijapur Court, that will greatly hamper and embarrass the trial of the Bombay suit. Therefore the Judge must have power to prevent this. The simplest and most complete method of preventing it is by an injunction against the party. But it should I think be in a slightly modified form and should only restrain the defendant from proceeding with the Bijapur suit in such a way as to delay or embarrass the trial of the Bombay suit.

Since we heard the arguments it has, in another appeal, been decided that an appeal does not lie against an order refusing an injunction. It was not argued that an appeal does not lie in this case, and as we are dismissing the appeal it does not greatly matter whether it does or does not lie.

Substantially the appeal is dismissed and with costs.

I agree with my learned brother's suggestion as to the date on which the suit should be restored to the Board.

Marten, J.—On the first point I am of opinion, after comparing the complaints in the two suits, that the matters in issue in this suit are not "directly and substantially in issue in the previously instituted suit" within the meaning of S. 10, Civil P. C. I leave open the question whether under S. 10 the words "the same parties" mean that the parties in the two suits must be the same, namely, no more and no less. If it had been necessary for me to arrive at a conclu-

sion on this question, I should have had to take into consideration the similar words which are used in S. 11 with reference to *res judicata*.

The second point taken by the appellants is that there was no jurisdiction to order them not to proceed with the Bijapur suit as against the respondents. In my opinion that point is not now open to the appellants. It was not raised in the Court below, nor is it raised in the memo. of appeal and on the merits of the case—so far as they are at present before us—I see no sufficient reason why the appellants should be granted any indulgence. I would therefore decide this point against them on this preliminary ground alone.

I cannot, however, entirely ignore the proposition which was urged at considerable length by their counsel, namely, that the Court of Chancery had no jurisdiction to grant an injunction, unless the defendant either resided or carried on business within the jurisdiction. One short answer to this proposition is that it cannot apply where, as here, the defendants have been served and have appeared in the suit without protest. Thus, in Halsbury's Laws of England, Vol. 17, p. 263, Note (g), it is said:

"A foreigner who has appeared to an action in an English Court gives jurisdiction to the English Court to restrain him from proceeding to litigate the same subject-matter in the Courts of his own country."

The authority cited in support of that proposition is *Dowkins v. Simonetti* (5), a decision of the Court of Appeal in England. That was a case where there were two suits pending for Probate of the Will of a deceased lady, one in England and the other in Italy. The applicant in the Italian suit was the defendant in the English suit; and in the course of his judgment the Master of the Rolls, Sir George Jessel, said as follows:

"The defendant, after the commencement of this action in England, has begun a litigation in Naples for the purpose (so to speak) of obtaining Probate in solemn form of the Will of 1872. The plaintiff has, under these circumstances, moved to restrain the defendant from proceeding with his action in the foreign Court.

"The question arises whether there is any jurisdiction at all to do so. I am far from saying that where a man has appeared in an English suit he has not thereby given the Court jurisdiction to grant any proper application

(4) A. I. R. 1915 Bom. 146=39 Bom. 604 = 30 I. C. 560.

(5) [1881] 29 W. R. 228=50 L. J. P. 30=44 L. T. 266.

against him. Therefore, although it might be improper in other circumstances, it may not be improper in this suit. To what sort of cases then is this jurisdiction applicable? Certainly, I think, in a case of 'double vexation.' Under the old practice when a man was sued in equity as well as at law, the plaintiff was put to his election, and it was just the same where one suit was in an English Court and the other suit in a foreign Court. The practice was to move to stay the proceeding either in the foreign Court or in the English Court. In dealing with such a question the Court prevented double vexation, but it always exercised a discretion. Where there appeared to be good ground for continuing two actions, the Court did not interfere. . . . It comes to this, then, that it is a matter of discretion, even assuming that we have jurisdiction."

Then, after considering the matter of convenience, the Court came to the conclusion that the Italian suit ought not to be stayed.

I may also refer to Dicey's *Conflict of Laws* (1908 Edition), p. 44, where the learned author considers the following general principle to be sound, although he says "its truth cannot be dogmatically laid down" (p. 45), viz:

"The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction, or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction."

Then, at p. 43, speaking of action in personam where the defendant is not in England, he says:

"The Courts of Common Law and of Equity have further always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought, an action or suit. This again is in strict conformity with the principle or test of submission."

So, too, the Civil Procedure Code refers in S. 20 (b) to the acquiescence of a defendant to the institution of a suit, although he may not reside or carry on business within the local limits of the Court's jurisdiction.

It seems to me, therefore, that it is erroneous to argue this case on the same lines as if the defendant had not appeared in this action, or, on the other hand, had appeared under protest and moved to set aside the service of the summons upon him.

The appellant based his argument on *Garron Iron Company v. Macloren* (6), but there the Scottish respondents were not parties to the English action, nor had they come in and claimed the benefit

of the English administration decree. They had only been served with a notice of motion in the English action just as any third party might be, who, for instance, interfered with a receiver appointed in an administration action. As to proceeding in this way by motion in the suit instead of by a separate suit, the Lord Chancellor said at p. 441:

"The practice is fully established; its origin is matter rather of curious speculation than of practical importance."

What professor Dicey has said as to submission must of course, be read with his warning at p. 212 that

"submission cannot give the Court jurisdiction to entertain an action or other proceeding which in itself lies beyond the competence or authority of the Court."

It is jurisdiction in this sense to which the Court refers when it considers whether it has any power to authorise a departure from the trusts of a trust deed, and if so, under what circumstances and to what extent [see *New's Settlement, In re Langh v. Langham* (7)]. But that warning does not apply to the Bombay suit itself, for that is an ordinary suit brought by commission agents with leave under Cl. 12, Letters Patent. Nor does that warning apply, I think, to the particular relief now under discussion, viz, an injunction (in effect) to prevent interference with the speedy prosecution of the Bombay suit.

Even, therefore, if I had considered the point as to jurisdiction was still open to the appellants, I should have decided it against them in this particular case.

The third and the last point is whether the jurisdiction has as a matter of discretion been properly exercised here. As to this, I see no reason to interfere except that I agree in the variation of the form of the injunction which my brother Heaton has stated. The Bombay case came on for hearing as a short cause in the vacation. The defendant did not put in his affidavit till the day of the hearing: and his Bijapur suit with its eight defendants and vague allegations would seem to offer good opportunities for vexation and delay. Under these circumstances, I can well understand an injunction being granted to restrain that vexation and delay so far as practicable.

The Bombay suit was directed to be replaced on Board on 9th June after the

(6) [1855] 5 H. L. O. 416=24 L. J. Oh. 620=3 W. R. 597=10 E. R. 961=101 R. R. 229.

(7) [1901] 2 Oh. 534=70 L. J. Oh. 710=85 L. T. 174=50 W. R. 17.

defendant had filed his written statement. We can now direct the Prothonotary to effect this for 5th or 12th August.

In the result, I agree that this appeal should be dismissed with costs.

G.P./R K.

Appeal dismissed.

*** A. I. R. 1920 Bombay 300**

SHAH AND HAYWARD, JJ.

Mohidin Karim and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 221 of 1919, Decided on 11th September 1919, against convictions and sentences passed by a Bench of Special Magistrates, Second Class, Satara.

* Criminal P. C. (5 of 1898), S. 16—Rules regulating constitution of Bench for trial are mandatory—Trial must be completed by Bench who commenced it—Decision by only two Magistrates out of three who commenced and partly heard, trial held vitiated.

A trial held by a Bench of Magistrates in contravention of the rules regulating the constitution of such Bench is void.

Thus, where the rules regulating the trial of cases by a Bench of Magistrates provide that a trial must be completed before the same Magistrates who commenced it, or must be held afresh before a different set of Magistrates, a trial continued and finished by two of three Magistrates who constituted the Bench in the first instance, is a trial held in contravention of the rules, and is therefore void. [P 301 C 1]

G. S. Rao—for Applicants.

S. S. Patkar—for the Crown.

Shah, J.—The petitioners before us in this case were tried by a Bench of Second Class Magistrates on a charge of grievous hurt under S. 325, I. P. C. The prosecution evidence was heard by three Magistrates and the defence evidence was heard by only two out of the three, with the result that the decision was given by the two Magistrates who had heard the case throughout. The Magistrates in question are appointed for the District of Satara, and the rules regulating the constitution of the Bench of Magistrates are to be found in the Notification of 30th October 1885 at p. 1262 of the Bombay Government Gazette for 1885, Part I. These rules were framed under S. 16, Criminal P. C., 1882 and are still in force.

The petitioners were convicted by the Bench of Magistrates on 13th May 1919. They appealed to the District Magistrate, and it was urged on their behalf that the

whole trial was void as it was contrary to the said rules, in so far as only two Magistrates finished the trial though it was commenced by a Bench of three Magistrates. The appellate Court held that the trial was valid. In the result the convictions of the present petitioners were confirmed.

They have presented an application to this Court, and it is urged that the trial is void as it contravenes the rules. It is provided by these rules that the Bench may try any cases triable by a third class Magistrate, and that if for any cause it is found necessary to adjourn the hearing of a case after the evidence has been partly taken, the trial must be completed before the same Magistrates who commenced it or must be held afresh before a different set of Magistrates. In the present case the trial was not completed before the same Magistrates who commenced it. It was not held afresh before a different set of Magistrates, but it was continued and finished by two out of the three Magistrates who constituted the Bench in the first instance. It is clear that the trial in this case contravenes the provisions of R. 4, and that it is void on that ground. It is urged however that under the rule it is open to hold a fresh trial before a different set of Magistrates and as R. 2 allows that any two persons appointed as Honorary Magistrates may constitute a Bench, in the present case the two Magistrates who continued the trial may properly be deemed to have substantially complied with the rule, as they had heard the whole case from the beginning to the end. It is further urged that the accused has not been prejudiced in any way and that it must be treated merely as an irregularity and not an illegality vitiating the trial. I am however unable to accept these contentions as sound. In my opinion there is no substantial compliance with the provisions of the rule which directs in the alternative that the trial should be held afresh before a different set of Magistrates.

It could not be said that when the two Magistrates continued the trial, heard the defence evidence and decided the case, they held the trial afresh or that they constituted a different set of Magistrates at the time. I do not say that those two Magistrates could not have

constituted a different set of Magistrates within the meaning of the rule, but in fact they could not be said to have done so with reference to the case. In fact they simply continued the part-heard case in the absence of their colleague. It is also difficult to say that there was no prejudice to the accused. But it seems to me that apart from any prejudice to the accused, where such a rule affecting the constitution of the Bench has not been complied with, the trial cannot be treated as valid. There is a further objection that the charge under S. 325, I. P. C., though not triable by a third class Magistrate has been tried by the Bench of second class Magistrates, in spite of R. 1 which provides that the Bench may try any case triable by a third class Magistrate. This objection was not taken in the lower Courts. On the information we have on the present record, we see no answer to this objection which affects the jurisdiction of the trial Magistrates. It is enough however for the purposes of this case to hold that the trial held is invalid on the first ground. The convictions and sentences must be set aside and the fine, if paid, refunded.

Having regard to the period of imprisonment already suffered by the petitioners as also to the circumstances of the case generally, I do not think that we need direct any further proceedings against the petitioners.

Hayward, J.—I agree. It is provided by R. 2 that a trial should be by a Bench of two where it is not possible to obtain three Magistrates. But it is provided by R. 4 that a trial once commenced must be ended before the same Magistrates. The meaning of this seems to me to be not before two only but before the same three Magistrates. The only alternative provided is a fresh trial before another set of Magistrates. If the rules result in inconvenience, then the remedy seems to me to be revision of the rules. They are old rules of 1885 and differ materially from the more recent rules prescribed for the Benches of Magistrates in Poona and Bombay. There was also another difficulty that the trial of an offence of grievous hurt was not triable by this particular Bench, which only had authority to try cases triable by third class Magistrates. The conviction

and sentence must be set aside as proposed by my learned brother.

G.P./R.K.

Rule made absolute.

A. I. R. 1920 Bombay 301

MARTEN, J.

The Rheinfels.

Cause No. 1 of 1914, Decided on 21st August 1919.

(a) Hague Convention (No. 6 of 1907), Arts. 1 and 3—Art. 3 does not apply to German ships.

Article 3 of the 6th Hague Convention does not apply to German ships, as Germany did not agree to this particular article. [P 303 C 2]

(b) Hague Convention (No. 6 of 1907), Arts. 1 and 2—Meaning of port within Arts. 1 and 2 stated.

The word "port" in Arts. 1 and 2 of the 6th Hague Convention means a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking. [P 303 C 1]

Bahadurji—for the Crown.

Facts appear from the following judgment dated 4th September 1914 of Macleod, J.:—

The SS *Rheinfels*, being an enemy vessel and having entered the port of Bombay after a declaration of war is to be detained until further order and to be handed over to the Director, Royal Indian Marine on his requisition; such requisition will be subject to any claim for payment of compensation between Government and the claimants made against the Crown which question will have to be decided after the war.

Liberty reserved to apply for the confiscation of the vessel.

Any application for cargo not delivered can be dealt in the same way as cargo claimed from the SS. *Warturm*."

In 1919 the Crown applied for condemnation of the ship as prize.

Judgment.—This is an application for condemnation of the German steamship *Rheinfels*, her freight and stores and such of her cargo as has not been delivered. She arrived in the vicinity of Bombay harbour as long ago as 7th August 1914 in the morning. She belonged to the Hansa line, her gross tonnage was 5,512 tons, and her speed according to her officers was 10½ knots. She was fitted with wireless apparatus, and was bound for Bombay, her last port of call having been Aden, some 1,650 miles away. War between England and Germany began at 1 p. m. on 4th August. She therefore left her last port before the outbreak of war.

Under an order of this Court of 4th September 1914, an order was made in somewhat similar terms to that in *The Chile* (1). It pronounced that the steamship *Rheinfels* belonged at the time of the capture and seizure thereof to enemies of the Crown, and it ordered the detention of the ship and all her stores until further order. The ship herself was handed over to the Director, Royal Indian Marine, on behalf of the Secretary of State for India in Council. There was liberty to apply for the confiscation and condemnation of the ship, her stores and cargo.

It is under the liberty to apply in this order that the present application, which is by way of motion, is now made. At the date when the order of 4th September 1914 was made the old Prize Court Rules, which date, I suppose, from the Napoleonic Wars were still in force. It was not till 6th November 1914 that by a Notification of the Governor-General in Council the present English Prize Court Rules were brought into operation in India. By the English Prize Courts (Procedure) Act, 1914, which enabled these Rules to be made, there was an express provision dealing with cases where Prize Court proceedings had already begun before the Act came into force. One alternative was provided by S. 1, sub.S. 2 (b), viz., that the case might be continued in accordance with the new Rules subject to such adaptations as the Court might deem necessary to make them applicable to the case.

Accordingly by an order of this Court, dated 31st March 1914, it was ordered that this cause be continued in accordance with the Prize Court Rules (1914) subject to such adaptations as the Court has deemed or may deem necessary in order to make them applicable to this cause. And the order went on to provide that this cause be set down for further hearing on a date which was subsequently altered by another order of 29th July 1919.

The reason why the Crown is now asking for condemnation of the ship is this: that it is now ascertained, so it is said, that the ship was not captured in the port or harbour of Bombay, as was the evidence before this Court in September

1914, but was captured outside that port, if one uses the word "port" in the sense in which it is used in the sixth Hague Convention. Consequently, it is said, on behalf of the Crown that Arts. 1 and 2 of the Hague Convention do not apply.

The second and alternative ground on which the application is made is this that having regard to the wireless messages which were sent from or received at the Government station, Butcher Island, Bombay, and from other circumstances, the Court ought to infer that the *Rheinfels* was aware of the outbreak of hostilities between England and Germany before she entered the port of Bombay, and that consequently she was not entitled to the protection given by Arts. 1 and 2 of the Hague Convention, even if she did enter the port.

I think it is still open to the Crown to take these points despite the order of 4th September 1914. That order only finally decided that the *Rheinfels* was a German ship. It left open the question whether she could be condemned as prize.

Taking then the point as to the place of capture first I think it establishes that this ship was stopped and boarded by the British military authorities, that is to say, by the Chief Examining Officer Commander Shearme, R. I. M., and two subordinates some three miles seawards from the Prongs light house. This light-house is at the end of a reef which juts out into the open sea for about half a mile south or south-west from Colaba Point. It must not be confused with Colaba light-house which is on the point itself. The officers came in a launch from the tug *Rose*, which was then engaged in war examination purposes under military orders. On boarding the ship, these officers exercised rights which would not, I think, have been justified in time of peace. Amongst other things, they entered the wireless cabin on the ship, they took possession of the books, they turned the wireless operators out of the cabin and then looked it up. Further the ship then proceeded with Commander Shearme on board, and escorted by the launch, to an anchorage south of what is known as the Middle Ground Shoal, where an armed party was put on board.

It is also established, in my opinion, that even this anchorage on the south

(1) [1914] P. 212=84 L. J. P. 1=1 P. C. 1=112 L. T. 248=12 Asp. M. C. 598=58 S. J. 852=31 T. L. R. 3.

of the Middle Ground Shoal is not a part of the "port," in the sense that ships load and unload there. The evidence is that ships do not load and unload there, and that in the monsoon it would be unsafe for any ship to discharge into lighters at that spot. In fact that anchorage is the usual examination anchorage. The place where a ship loads or unloads is further north, viz., to the north or north-east of the Middle Ground Shoal, unless, as is more usual, the ships go into the docks themselves. A chart of Bombay has been put in, and there the witness has marked with a cross the place south of the Middle Ground, where the Rheinfels was anchored. The chart is an old one, and unfortunately does not take in the Prongs light-house, nor the spot where the ship was first boarded. I have not however thought it necessary to adjourn the case for a further chart to be put in. The oral evidence is reasonably clear, and can, if necessary, be supplemented by an atlas, such as the Graphic Atlas of the World, which has small but useful maps of Bombay on pp. 64 and 67 of the 1910 Edition. I have not had the advantage of seeing Commander Shearme in the witness box, as counsel tells me he is in England, but his subordinate officer, Mr. Warden, has given evidence before me, and given it carefully and well.

The significance of the place of capture lies in this, viz., that by two decisions, the one by Sir Samuel Evans in *The Mowe* (2) and the other by their Lordships of the Privy Council in *The Belgia* (3), it has been clearly established that the word "port" in the 6th Hague Convention does not mean a port in the sense of a fiscal or customs port, nor does it refer to territorial waters. It must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking: see *The Mowe* (2). Accordingly in the case of *The Mowe* (2) although she was captured in the Firth of Forth, which was within the fiscal limits of the port of Leith, she was held to be captured at sea and not in port.

Similarly, in the case of *The Belgia* (3)

(2) [1915] P. 1=84 L. J. P. 57=1 P. C. 60=112 L. T. 261=59 S. J. 76=81 T. L. R. 46.
(3) [1916] 2 A. C. 188=85 L. J. P. 106=2 P. C. 82=114 L. T. 957=60 S. J. 457=32 T. L. R. 485.

which was captured outside Newport, that is to say, outside the entrance to the river Usk, which is the river for Newport there, too, the ship was held not to have entered a port.

So, too, in *The Erymanthos* (4) it was held by the Malta Prize Court that the ship, though captured at the Malta examination anchorage, was not captured in port.

The 6th Hague Convention, or rather the English translation of it, will be found on p. 444 of the English Manual of emergency Legislation. Art. 1 runs as follows:

"When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it."

Then it goes on:

"The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out."

Stopping there, the decisions I have referred to establish that for Art. 1 to apply, a ship must "enter a port." Therefore if she is captured at sea before she enters a port, Art. 1 does not apply.

Then Art. 2 provides:

"A merchantship which owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation or he may requisition it on condition of paying compensation."

But there again, she has to be in the enemy port. If she is captured before that, then the article does not apply.

Art. 3 deals with ships which left their last port before the war as here and are encountered at sea while still ignorant of hostilities. I use the words "at sea" advisedly, as the English translation "on the high seas" appears to be a mistake: see *The Mowe* (2). They also must not be confiscated but only detained. It has however been decided that this article does not apply to German ships, because Germany did not agree to this particular article, and consequently her ships cannot claim the benefit of it. That was decided in *The Marie*

(4) [1915] 1 Br. & Col. P. C. 339.

Glaeser (5) and also in *The Perkeo* (6). Accordingly, I have only to deal with Arts. 1 and 2.

Turning then to the facts of this case, I have already said that I am satisfied the ship was stopped and boarded well outside the Prongs light-house. In saying that, I did not overlook the original evidence, viz., the joint affidavit of Commander Warden and Commander Shearme of 10th August 1914, in which Commander Shearme stated that the ship arrived in the "harbour" of Bombay on 7th August and that on the same day she was captured by him and his crew assisted by the Examination Battery in the "harbour" of Bombay, and that a military guard was placed on board in charge of the steamship and her papers. So, too, in the answers to interrogatories administered to the master and officers of the German ship, they all say that she was taken and seized in Bombay "harbour."

Curiously enough in *The Belgia* (7) Sir Samuel Evans had very similar evidence before him; that is to say, there was an affidavit by the Surveyor of Customs saying that the ship was seized as prize for the use of His Majesty in the "port" of Newport. Similarly the writ in the action described the ship as having been seized at the port (see p. 305). Sir Samuel Evans in his judgment stated:

"The circumstances under which this vessel was captured have been fully stated to me, and I must decide the case in accordance with what was actually done, and not in accordance with any language, accurate or inaccurate, which may have been used by the laymen in and about the port of Newport at the time of the commencement of this war, when people were not familiar with the nomenclature or with the provisions which one has made since."

Then he says:

"I find, in fact, that this vessel was captured at sea after the outbreak of hostilities."

Then he describes the place and proceeds:

"Being captured there and in these circumstances, I have come to the conclusion that she was captured at sea. If that is right, I need not trouble at all about the Hague Convention No. 6, Arts. 1 and 2; but in deference to the argument of counsel for the claimants I will say a word or two about them."

(5) [1914] P. 218=84 L. J. P. 8=1 P. C. 38=112 L. T. 251=12 Asp. M. C. 601=59 S. J. 8=31 T. L. R. 8.

(6) [1914] 1 Br. & Col. P. C. 136=84 L. J. P. 149=112 L. T. 251=12 Asp. M. C. 600=58 S. J. 852.

(7) [1915] 1 Br. & Col. P. C. 303=59 S. J. 561=31 T. L. R. 490.

That was the decision which on appeal was affirmed by the Privy Council in *The Belgia* (3).

Under the above circumstances, I am satisfied that this ship, whether she was captured outside the Prongs light-house or on this examination ground south of the Middle Ground, had not entered "the port of Bombay within the meaning of the Hague Convention. But, I base my decision primarily on this, viz., that in my opinion she was captured some three miles outside the Prongs light house. I am not satisfied that this spot is within the limits of the fiscal port of Bombay, but assuming that it is, I think it clear on the authorities that this spot is not within the "port" of Bombay, as that expression is used in the Hague Convention.

I also hold on the evidence that she was captured and seized at this spot. Even however if she was not captured and seized until she reached the examination anchorage south of the Middle Ground, I should still hold that she had not entered the "port" in the above sense. That anchorage may be a "roadstead", but as pointed out by Sir Samuel Evans in *The Mowe* (2) in the French text of the Conventions, the word "ports" is used in various places in conjunction with, but in contradistinction to, roadsteads and to territorial waters: See Convention 13, where the words '*les ports, les rades, ou les eaux territoriales*,' are frequently used.

It follows that in my opinion the 6th Hague Convention does not apply to this ship and that accordingly she ought to be condemned as a lawful prize.

In the view, therefore which I take, it is unnecessary to decide the second ground on which the Crown has asked me to condemn the ship, viz., her knowledge of the outbreak of hostilities. The evidence does not establish expressly that the Rheinfels either sent or received any message showing that war between England and Germany had broken out. It is all a matter of inference. She was at the time on a voyage from Aden to Bombay. She no doubt was fitted with the Telefunken system of wireless telegraphy, which would enable her to receive messages from wireless stations in Germany. She would also be able to receive the messages which were sent out from the Butcher Island radio station

It is also proved to my satisfaction that as from the morning of 5th August to the afternoon of 6th August, the operator in charge of this radio station was sending out messages to British ships warning them that war had broken out and that they must not enter any German port. It is clear also that from about 7-10 A. M. on the 6th August, the Rheinfels was in wireless communication with Butcher Island, being then some 240 miles away. Her wireless system was a different one, but she used the same wave length as the Marconi system, and accordingly could pick up the messages sent out from Butcher Island. Her wireless system was also in working order. One can tell that from the messages she sent. She was also near the City of Lahore which was also bound for Bombay and receiving messages from Butcher Island.

On the other hand, there is this that the captain did go straight into Bombay and made no attempt to deviate and run for Marmagao or any other port. Further, he kept up communication and gave his distances. Thus his message at 5-55 P. M. on 6th stated that he was 130 miles off. In so doing, he was adding to his risk of being captured on the high seas, and it is rather more consistent with his not knowing that war had broken out than with the knowledge that it had. Again, if he knew that war had broken out, but decided the safest course was to go to Bombay, it might have assisted him to have arrived with his wireless out of order, supposing a plausible excuse could be given for that. H. M. S. Dartmouth evidently thought it likely that the captain would make for Marmagao, if he knew of the outbreak of war, for she set out in the afternoon of the 6th to intercept the Rheinfels there. Further it appears by the answers to interrogatories that the wireless operators were the 3rd and 4th officers. Prima facie these officers would normally be attending to their ordinary duties as 3rd and 4th officers and would have little time left for wireless messages. I cannot therefore assume that this cargo boat would necessarily pick up all the messages which a passenger liner might, for the latter might keep two operators exclusively engaged in the wireless cabin.

I have been referred by counsel to the case of *The Gutenfels No. 2* (8), where

(3) [1915] 1 Br. & Col. P. O. 186.

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Mr. Justice Cator, in giving judgment in Egyptian Prize Court, said:

"The sole safe rule upon which a Prize Court can act is to assume that every ship fitted with wireless apparatus receives from its Government either directly or by transmission from other ships, prompt news of the outbreak of hostilities between its own and any other country."

He however held on the facts that the ship was ignorant of the outbreak of hostilities. That case went on appeal to the Privy Council on another point [*The Gutenfels* (9)] where the judgment was varied, and an order made as in the case of the *The Chile* (1). Their Lordships did not, however deal with the above proposition, and I do not think I need either. I have arrived at a definite decision on the first point, and I do not think it necessary to arrive at a definite finding either of fact or law on the second point.

Having regard to my decision on the first point, there will be a decree for the condemnation of the ship, her stores and tackle and also the freight which is in the hands of the Collector of Customs of Bombay. He, I am told, occupies the position of Admiralty Marshal. There is also a small sum in his hands of Rupees 1,295-13-1 representing the net proceeds of certain undelivered cargo on the ship. Nearly all the cargo has been delivered under orders made by this Court from time to time and this small balance represents unclaimed or undelivered cargo. I condemn this balance also as representing cargo on an enemy ship.

As regards the form of the order the Admiralty Registrar will no doubt look at the Forms of Order contained in the schedule to the English Prize Court Rules (1914), Form No. 53 (see English Manual of Emergency Legislation, p. 331) They will require some adaptation to the present case. The draft order is to be shown to me before it is passed and entered.

As regards the costs, I see there are certain reserved costs here. I will give a general direction that the costs of the Crown are to be paid out of the proceeds in the hands of the Collector of Bombay. Subject to those costs, there will be a direction that the Collector do transfer the moneys in his hands to the Crown as the Crown may direct. If the Crown

(9) [1916] 2 A. O. 112=85 L. J. P. O. 146=2 P. O. 96=114 L. T. 953=60 S. J. 477=32 T. L. R. 433 (P. O.).

does not require taxation or any special order as to costs the whole fund can be transferred.

I will reserve liberty to apply in case there are any other points which may require the Court's direction.

There is one point of practice which I should like to mention and that is this. The cause has come before me on viva voce evidence, and certain officers have been brought down to Bombay for that purpose. One has had to come from such a distant place as Rawalpindi. Should however a similar case arise in the future, I think the Advocate General should consider whether it is not possible under the Prize Court Rules, 1914, to give evidence by affidavit. The officers of the ship concerned in the capture can certainly give evidence by affidavit: see O. 15 R. 2 (b) and I should have thought evidence by affidavit might properly be admitted by the Judge under O. 15. R. 2 (e). There may be cases in which viva voce evidence is essential, but in many it is not. Further, in war time, naval and military officers cannot be spared for attendance in law Courts, and the same observation applies to wireless operators and censors or cypher experts. My recollection of the English practice is that affidavit evidence was principally used, and that it was by no means confined to officers of the capturing ship. I think that will probably be found a far more convenient course in every way than what has taken place to-day. Not only will it save the time of the Court, but it will also save officers being taken from their ordinary duties or brought by long journeys from the other end of India.

One other point I should also mention. If any matter of the Hague Convention comes up again, there should be a proper official publication of the Hague Convention for use by the Court. I mean an official publication containing the original French text and the English translation. Counsel for the Crown were provided with this in England, and my recollection is of a blue book with the two texts in parallel columns. If there are no copies of this in Bombay, it should I think be obtained from England as the French text is material.

I am also told by the Advocate General that the text of the Peace Treaty has not yet been received here: and that he does not know whether it has any provision

with regard to the 6th Hague Convention. I have not however thought it necessary to defer my decision till that information was supplied. The question whether the 6th Hague Convention is binding at all as between England and Germany was left open in *The Gutenfels* (9) and again in *The Prinz Adalbert* (10) and I of course have not dealt with that question.

Judge's Note.—In correcting the short hand notes of the above judgment, I had occasion to refer to the Butcher Island Radio log, Ex. C. I there found that in the early morning of 7th August 1914 this station was recording message from Nauen (in Prussia) sent out in cypher. This was not mentioned to me at the hearing and is in favour of the Crown. The answers to interrogatories denied however the possession or knowledge of any Code (except the international Code) and as there is no evidence from the Naval Intelligence Department to show that German cargo ships would know any cypher Code of the German Government, it does not perhaps carry the matter much further. Nor does it follow that the 3rd and 4th officers were then engaged in the wireless cabin. On the whole therefore I have thought it unnecessary to have the case set down for further hearing.

The order as eventually drawn up was without prejudice to any question whether the property thereby condemned as prize was droits of the Crown or droits of the Admiralty: see *The Abonema* (11) *The Hillerod*, *The Florida*, *The Albania*, *The Adjutant* and *The Belgia* (3).

G.P./R.K. *Vessel condemned.*

(10) [1918] A. C. 500=87 L. J. P. 145=3 P. C. 70=14 Asp. M. C. 296=118 L. T. 161=34 T. L. R. 229.

(11) [1919] P. 41=88 L. J. P. 113.

A. I. R. 1920 Bombay 306

MACLEOD, C. J. AND HEATON, J.

Budhmal Kevalchand—Plaintiff—Appellant.

v.

Rama Yesu Sangle—Defendant—Respondent.

Second Appeal No. 142 of 1913, Decided on 28th August 1919, from decision of Dist. Judge, Nasik, in Appeal No. 258 of 1912.

Civil P. C. (5 of 1908), O. 34, R. 1—Equity of redemption split up—Claim against same barred—Mortgagee will not be entitled to

throw whole burden on others—Transfer of Property Act (1882), S. 60.

Where the equity of redemption of a mortgage is split up and several persons become entitled to different portions of it and a suit on the mortgage is barred by time as against some of the purchasers of the equity of redemption, while it is within time as against the remainder, it would be contrary to the principles of equity to permit the mortgagee, who by his own negligence has lost his remedy as against a portion of the equity of redemption to throw the whole burden of the mortgage on the owners of the remaining portions. [P 207 C 1, 2]

K. H. Kelkar—for Appellant.

D. C. Virkar—for Respondent.

Judgment.—The plaintiff sued to recover Rs. 500 for principal and Rs. 500, for interest, in all Rs. 1,000, by sale of the property mortgaged by the father of defendant 1 and the grandfather of defendants 2 to 4, to plaintiff's assignors, Chaturbhuj and Gumanchand Marwaris, on 28th October 1870. It appears that the equity of redemption was sold in 1883 to the father of defendant 5 and another. Those two purchasers separated. Half the equity of redemption came to defendant 5, one-fourth to Kashi Ramji, and one fourth to Dada Kashi by sale from Kashi Ramji. Kashi Ramji and Dada Kashi ought to have been made parties to this under O. 34, R. 1, Civil P. C., but the plaintiff refused to make them parties, because as a matter of fact his claim against them had become time barred. He now seeks to throw the whole burden of the mortgage on half the property, the equity of redemption in which came to defendant 5. An exactly similar case arose in *Imam Ali v. Baij Nath Ram Sahu* (1). Their Lordships there remarked :

"In the case before us, all the properties comprised in the mortgage are liable for the satisfaction of the debt and after different persons have become interested in different fragments of the equity of redemption, the properties continue to be so liable ; and all that the owner of any portion of the equity of redemption is legitimately entitled to ask is that not more than a rateable part of the mortgage debt should be thrown upon the property in his hands. This is manifestly just and the mortgagees cannot claim to throw the entire burden upon a portion of the mortgaged premises because by reason of their own laches, they have lost their remedy as against the remainder."

This is what has happened in this case and it is manifestly contrary to the principles of equity that the plaintiff, who by his own negligence, had lost his

(1) [1906] 88 Cal. 618=8 O. L. J. 576=10 C. W.N. 551.

remedy against the owner of half the equity of redemption, should seek to throw the whole burden of the mortgage on the owner of the other half. In our opinion therefore the appeal fails and must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 307

MACLEOD, C. J. AND HEATON, J.

Dayal Khushal—Plaintiff—Appellant.

v.

Secy. of State—Defendant—Respondent.

First Appeal No. 239 of 1918, Decided on 9th February 1920, from decision of Dist. Judge, Surat, in Civil Suit No. 10 of 1921.

Bombay Revenue Jurisdiction Act (1 of 1876), S. 11—S. 11 bars suit to set aside Collector's order of removing encroachment.

A Collector made an order directing the plaintiff to remove an alleged encroachment on a public road. The plaintiff preferred no appeal against this order but more than two months after the order was made he brought a suit in the civil Court to get the order set aside :

Held : that the suit was barred by the provisions of S. 11. [P 508 C 2]

G. N. Thakor—for Appellant.

S. S. Patkar—for Respondent.

Heaton, J.—This is a suit which the plaintiff brought for the reversal of an order passed by the Collector of Surat, directing the plaintiff to remove an alleged encroachment on a public road, and for an injunction against the defendant to suspend the said order pending the suit. When the suit came on for hearing before the District Judge of Surat, he held that it was barred by S. 11, Bombay Revenue Jurisdiction Act, because the plaintiff had not presented all the appeals allowed by law in the matter. In fact, he had not presented any appeal. The Collector's order was made on 6th February 1917, and on 21st April, i. e., nearly two and a half months later, the Collector followed up his order by intimation that, unless the plaintiff filed a suit, the order would be given practical effect to by removing the encroachment. Thereupon the plaintiff did file this suit. Moreover it would seem that the plaintiff never, either before filing the suit or afterwards, made any appeal to the Commissioner either against the Collector's first order or his later intimation. There is, it is said, no evidence on the record as to whether an appeal was or was not presented to the Commissioner, but it

must have been admitted in the lower Court that no appeal had been presented, or the suit could not have been dismissed under S. 11, Bombay Revenue Jurisdiction Act.

On the facts so far stated, the suit was quite plainly, and as I think rightly, dismissed. But it is argued that the principle of the case of *Secy. of State v. Gajanan Krishna* (1) applies here, that is to say, it is said that if a plaintiff brings a suit for an injunction, he is not bound by the provisions of S. 80, Civil P. C., and by analogy therefore he is not bound by the provisions of S. 11, Bombay Revenue Jurisdiction Act. I was myself a party to the decision to which I have referred, and I see that there is a judgment of mine in the case. I am afraid the principle that was in my mind in giving that judgment has been very greatly misapprehended. It is true that I still think that if the only remedy which a party has, is to obtain an injunction from a civil Court and if the circumstances are such that if the injunction is not obtained, the mischief sought to be avoided will inevitably be done; then the Court will be justified in accepting the suit even without the previous notice required by S. 80 of the Code. Because, on the assumptions I am making, if that were not done, the suitor would be left without any effective remedy whatever. The Civil Procedure Code, which contains our law as to how suits are to be presented, cannot intend that its provisions should be so applied as to deprive a suitor of the only remedy by which a wrong to him can be prevented. That however is a principle which has no application here. The remedy provided by the law was an appeal to the Commissioner against the order of the Collector. That order was dated 6th February. More than two months elapsed without the plaintiff taking any action whatever by way of appeal. When the further intimation from the Collector arrived he had still a fortnight within which he could appeal to the Commissioner and obtain an order staying the removal of the alleged encroachment. But, instead of adopting this method which was the method of redress indicated to him by the law, and a perfectly effectual method of redress, he came to the civil Court. I think therefore that

when we examine the facts of this case, it is found that S. 11, Bombay Revenue Jurisdiction Act, does apply that this is not a case in which the only remedy that the plaintiff had was an immediate application to the Court for an injunction, and consequently that the suit was rightly dismissed.

I think the appeal must be dismissed with costs.

Macleod, C. J.—I concur.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 308

MACLEOD, C. J. AND HEATON, J.

Viramgam Municipality—Defendant—Appellant.

v.

Bhaichand Damodar—Plaintiff—Respondent.

Second Appeal No. 740 of 1917, Decided on 25th August 1919, from decision of Dist. Judge, Ahmedabad, in Appeal No. 406 of 1915.

Bombay District Municipalities Act (3 of 1901), Ss. 92 and 96—Notice to remove ota built without sanction held competent under Cl. 5, S. 96—No question of ownership of site did arise.

Plaintiff built an ota to his house without previously obtaining the permission of the defendant Municipality. The defendant served a notice upon the plaintiff to remove the ota. Plaintiff sued for an injunction restraining the defendant from removing the ota.

Held: (1) that the defendant Municipality was justified in issuing the notice under Cl. 5, S. 96, Bombay District Municipalities Act; (2) that the question whether the site occupied by the ota belonged to the plaintiff or the Municipality did not arise at all. [P 809 C 2]

G. N. Thakor—for Appellant.

H. V. Divatia—for Respondent.

Macleod, C. J.—The plaintiff sued for a permanent injunction restraining the defendant Municipality from removing the disputed ota that he had raised, alleging that the defendant's notice of 23rd October 1913 for its removal was illegal and ultra vires. The very simple fact appears from the evidence that the plaintiff built this ota without obtaining permission of the Municipality under S. 96, Bombay District Municipalities Act, and having built without that leave the Municipality were entitled under sub-Cl. (5) to issue a notice requiring such building or addition to be altered or removed, and under S. 154 (6) they were entitled to give notice that if the plaintiff did not comply with the notice to

(1) [1911] 35 Bom. 362=10 I. C. 639.

remove, the work would be done by the Municipality at the plaintiff's cost.

The main question which seems to have been tried in both the lower Courts was whether the ground on which the ota was built was part of a public street or not. Issue 1 in the trial Court was whether the site of the ota in dispute belonged to, and as such had been in possession of, the plaintiff. The trial Judge held that the site did not belong to the plaintiff, nor was it in his occupation as alleged. Then he went on to hold that it was part of the street land not vested in the Municipality. In consequence of that finding, and the way in which issue 1 was dealt with, a long discussion ensued as to whether the land on which this ota was built was part of a public street or not. The same error appears in the proceedings in the lower appellate Court, as after remarking that it had been held that the land on which the ota was constructed was not the plaintiff's land, the learned Judge went on to say:

"the next question was whether the street in which the ota was put up was a public street."

The learned Judge thought, as the street was not a public street, the Municipality had no right to remove the ota nor had it any right to prohibit the plaintiff from building the ota. That finding appears to me to have been due to a misunderstanding regarding the proper construction of S. 96, which provides that a person intending: (1) to begin to erect any building; or (2) to alter externally any existing building; or (3) to add to any existing building; or (4) to reconstruct any projecting portion of a building in respect of which the Municipality is empowered by S. 92 to enforce a removal or set back, shall give notice thereof to the Municipality in writing and shall furnish to them at the same time, if required by a by-law or by a special order to do so, certain documents and plans.

The Court seems to have been of the opinion that this was a question of reconstructing a projecting portion of a building in respect of which the Municipality is empowered by S. 92 to enforce a removal or set-back. It is quite clear that in this case the plaintiff was seeking to add to an existing building, and S. 92 does not come into the case at all. The plaintiff was bound to ask for permission

before he could build the additional structure, and if he built without obtaining permission, he did so at his own risk. Therefore it is quite clear to me that the Municipality was justified in acting within their powers in issuing the notice of October 1913, calling upon the plaintiff to remove the structure. In my opinion the appeal succeeds. The decree of the lower Court must be set aside and the suit dismissed with costs throughout.

Heaton, J.—I agree. The meaning of S. 96, Bombay District Municipalities Act, apparently seems to have been misunderstood. I entirely concur in the analysis given by my Lord the Chief Justice of Cl. (1) of that section. It deals with four classes of cases, and it is only in dealing with the fourth class that S. 92 comes into operation. It might, of course, have been a point in dispute in this case as to whether the mere making of a plinth was adding to an existing building. But as a matter of fact that contention never was raised, so we need not consider it. The plaintiff himself asked for permission to make the addition to the building that is to say, the plaintiff himself proceeded as if S. 96 applied and thereafter the Municipality also proceeded under S. 96, and it is now outside argument that in this case S. 96 is the one to apply. How then it ever came to be supposed that it mattered to anybody whether there was a public street or a private street or indeed any street at all, I am totally unable to understand. The judgments of the lower Courts do not do anything to remove the obscurity of my mind as to how this question of a street ever was raised. I suppose something was assumed by both parties before the District Judge that is not assumed here. I think therefore the appeal must be allowed as proposed.

G.P./R.K.

Decree reversed.

A. I. R. 1920 Bombay 309

MACLEOD, C. J. AND HEATON, J.

Vanichand Rajpal and others—Plaintiffs—Appellants.

v.

Lakhmichand Maneckohand—Defendant—Respondent.

Original Civil Appeal No. 51 of 1919, Decided on 24th July 1919.

Letters Patent (Bombay), Cl. 15—Order refusing grant of injunction to restrain defendant from proceeding with suit in Native State

is not appealable—(Per Macleod, C. J.)—Judgment means adjudication on merits—(Per Heaton, J.)—If such order affects jurisdiction then appeal lies.

An order refusing to restrain the defendant from prosecuting a suit filed by him against the plaintiff in a Court of a Native State is not a judgment within the meaning of Cl. 15, and no appeal therefore lies against such an order under that clause. [P 311 C 1]

Per Macleod, C. J.—The word "judgment" in Cl. 15, means a decision which affects the merits of the question between the parties by determining same right or liability. [P 310 C 1]

Per Heaton, J.—If an order directly involves a real question of jurisdiction, if its effect is to give jurisdiction or to take away from the Court jurisdiction, then an appeal will lie against such order under Cl. 15. [P 311 C 1]

Setalvad and Desai—for Appellants.

Kanga—for Respondent.

Macleod, C. J.—This is an appeal from the order of Pratt, J., on an application made by the plaintiffs on motion that pending the hearing and final disposal of this suit the defendant, his servants and agents might be restrained by an order and injunction of this Honourable Court from prosecuting the suit filed by him against the plaintiffs in the Court of the Morvi State. The learned Judge held that the motion failed and directed the plaintiffs to pay the costs of the motion.

A preliminary point has been taken that no appeal lies against that order. It is admitted that the appeal could only lie under Cl. 15, Letters Patent, and that therefore no appeal lies unless the order can be considered as a judgment. A "judgment" in Cl. 15, according to the decision in *Justices of the Peace for the town of Calcutta v. Oriental Gas Company* (1), which has been followed in this Court, means a decision which affects the merits of the question between the parties by determining some right or liability. The questions in this suit appear in the prayers of the plaint. It was prayed, first, that it might be declared that the partnership between the plaintiffs and the defendant was dissolved on or about 26th June 1917; that since the date of the said dissolution the plaintiffs were the sole owners of the assets of the said firm, that the defendant had no interest in the profits of the said firm since the date of the dissolution; and then the plaintiffs further asked that pending the hearing and final disposal of this suit the defend-

ant, his servants and agents should be restrained from prosecuting the suit he filed in the Court of the Morvi State.

Now the defendant in this suit filed a suit in the Morvi Court on the 4th January 1919, praying that the Court should take an account of the partnership business and realize its assets, and that on such account being taken, the Court would be pleased to pass a decree in the plaintiff's favour for such amount as appears due to him from the defendants or for whatever relief he might be entitled to.

The plaintiffs in this suit did not file their plaint until 14th May 1919. Now it is difficult to see how the order of Pratt, J., refusing to grant the injunction asked for is a decision which affects the merits of the questions between the parties by determining any right or liability on either side. It has been suggested that the effect of refusing to grant the injunction would be to oust the jurisdiction of this Court. If the jurisdiction of this Court in this suit is in any way ousted, it is owing to the fact that the plaintiff in the Morvi suit preferred to file his plaint there, and might get a decree in that Court which would bar, under S. 13, Civil P. C., the plaintiffs' suit in this Court, unless the plaintiffs can succeed on any of the exceptions to that section. We have been referred to the case of *Sonabai v. Tribhowandas* (2). In that suit Davar, J., ordered the plaintiff to deposit with the prothonotary a sum of Rs. 3,000 as security for defendant's costs. It was objected on appeal as a preliminary point that no appeal lay against the order and it was conceded that there could only be an appeal if the order was a judgment within the meaning of Cl. 15, Letters Patent. Batchelor, J., said in referring to the case of *Hadjee Ismail Hadjee Hubeeb v. Hadjee Mahomed Hadjee Joosub* (3):

"I am of opinion that this reasoning covers the case of the order now under discussion for the effect of it is at least conditionally to deprive the Court of the jurisdiction which it otherwise would have to try the plaintiff's suit."

That is not the case here. If the order of Pratt, J., is allowed to stand the jurisdiction of this Court is not ousted as a direct consequence of that order. It may be ousted in future by the defendant in this Court obtaining a decree in

(2) [1908] 32 Bom. 602=10 Bom. L. R. 337.

(3) [1874] 13 B. L. R. 91=21 W. R. 303.

(1) [1872] 8 B. L. R. 433=17 W. R. 364.

the Morvi Court. But whether that will occur or not remains for future decision. I can see nothing in this order which brings it within the definition of "judgment" above referred to. Therefore in my opinion the preliminary point is good and no appeal lies.

We have heard counsel however for the appellants on the merits. I may say that in my opinion the decision of the learned Judge in the Court below was perfectly correct. The appeal will therefore be dismissed with costs throughout.

Heaton, J.—I agree both that the order of the Court below was correct on the merits, and also that no appeal lies. It may be that the definition of the word "judgment" as used in Cl. 15, Letters Patent, which was quoted by my Lord the Chief Justice is not exhaustive. I gather from the case of *Hadjee Ismail Hadjee Hubzeb v. Hadjee Mahomed Hadjee Joosub* (3) that if the order directly involves a real question of jurisdiction, if its effect is to give jurisdiction or to take away from the Court jurisdiction then an appeal will lie. But there is nothing of that kind in this case. It is not disputed in this appeal that the Court had jurisdiction to grant or refuse an injunction. But it is contended that the effect of refusing an injunction was to deprive the Court of its own jurisdiction. To my thinking, if the jurisdiction of the Court can in any way be affected, it is or rather it will be (because the event has not yet happened) by operation of law. If the Morvi Court makes a decree then, by the operation of S. 13, Civil P. C., the High Court here may be debarred from proceeding with the suit. But to refuse to prevent the natural operation of the law in that way is not to cause an ouster of the jurisdiction. Therefore, I agree that the appeal should be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 311

SHAH AND CRUMP, JJ.

Sadashiv Bab Habbu—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 354 of 1919, Decided on 5th December 1919, from conviction and sentence passed by 1st Class Magistrate, Honawar, in Criminal Case No. 69 of 1919.

Bombay Prevention of Gambling Act (4 of 1887), S. 8—Cash and ornaments found on person of gamblers are not instruments of gaming and cannot be forfeited.

Under the terms of S. 8, Bombay Prevention of Gambling Act, cash, currency notes and ornaments found on the persons of those in a gaming house cannot be treated as instruments of gaming, even though they may have been used, or may be intended to be used for the purposes of gaming and therefore are not liable to forfeiture. The power of forfeiture extends only to securities for money, and other articles seized in the house which are not instruments of gaming. [P 311 C 2, P 312 C 1]

J. G. Rele for Nilkanth Atmaram—for Applicant.

Judgment.—In this case several accused have been convicted under Ss. 4 and 5, Bombay Prevention of Gambling Act, 4 of 1887. In the course of the search under the Act not only were certain articles, including cash, found in the house attached; but also certain cash ornaments and currency notes on the persons of the several accused were attached. The trial Magistrate has found on the evidence that the cash, ornaments and other articles, except those mentioned in his judgment, had been either used in gaming or intended to be used, and he has ordered them to be forfeited to Government under S. 8 of the Act.

It is clear from the provisions of S. 8 and the decision in the case of *Emperor v. Walli Mussaji* (1) that the power of forfeiture extends only to securities for money and other articles seized in the house which are not instruments of gaming. It is clear from para. 1 of the section that the convicting Magistrate may order all instruments of gaming found in the house or on the persons of those who were found in the house to be forthwith destroyed, and it is clear from para. 2 that the power of forfeiture really is confined to those articles which are not instruments of gaming and which have been seized in the house. The power of forfeiture does not extend to articles found on the persons of the accused which are not instruments of gaming. The order of the Magistrate as to forfeiture seems to me to be inconsistent with his finding as to the cash, and ornaments being instruments of gaming. It seems to follow from the terms of S. 8 that the cash, currency notes and ornaments found on the persons of the accused cannot be treated as instruments of gaming for the purpose

(1) [1902] 26 Bom. 641=4 Bom. L. R. 427.

of that section, even though they may have been used or may be intended to be used for the purposes of gaming. The cash, currency notes and ornaments found on the persons of the accused cannot be ordered to be forfeited to Government, but ought to be returned to the respective persons from whom they were taken.

The petitioners before us are accused 3, 5, 6, 7, 8 and 15. But as the case is brought to our notice on this petition, we make the order which would apply to all the accused, on whose persons cash, currency notes and ornaments were found, even though some of them may not have applied to this Court.

The order of forfeiture made by the Magistrate is set aside and the cash, currency notes and ornaments found on the persons of the accused, as noted in the panchnama to which the order of forfeiture relates, are ordered to be returned to the respective persons from whom they were taken.

G.P./R.K.

Order set aside.

A. I. R. 1920 Bombay 312

MACLEOD, C. J. AND HEATON, J.

Devidas Dwarkadas—Plaintiff—Appellant.

v.

Shamal Gopal—Defendant—Respondent.

Second Appeal No. 679 of 1913, Decided on 31st October 1919, from decision of Dist. Judge, Ahmedabad, in Appeal No. 402 of 1915.

Evidence Act (1 of 1872), S. 116—Mortgage of unrecognized division of narwa but mortgagor continuing in possession as lessee from mortgagee—Mortgagor held estopped from pleading invalidity of mortgage—Bombay Bhagdari and Narwadari Act (1862), S. 3.

Defendant, the owner of land which formed an unrecognized division of a narwa, mortgaged it, but continued in possession under yearly leases. Plaintiff, the assignee of the mortgagee, sued to recover possession of the land on the ground that it had been leased to defendant, and it was contended that the mortgage and lease were void under S. 3, Bhagdari and Narwadari Act:

Held: that the plaintiff was entitled to the relief he claimed and that the defendant having attorned to the plaintiff, it was not open to him in this suit to contend that the plaintiff had no right to let out the property on rent.

[P 313 C 2]

R. J. Thakor—for Appellant.

G. N. Thakor—for Respondent.

Macleod, C. J.—The plaintiff sued to recover possession of the plaint land on

the ground that it had been leased to the defendant, and for Rs. 39 for rent.

He alleged the land belonged to one Marghabhai Babar, who leased it to defendant for one year for Rs. 39 by a lease dated 30th June 1914. The plaintiff was an assignee of the lease under a deed dated 14th June 1915.

The defendant was the owner of the suit land which formed an unrecognized division of a narwa. In 1895 he mortgaged it to Babar Solaidas, but continued in possession, first under a lease for ten years, then under yearly leases of a moiety, and finally under yearly leases of the whole. Merghabhai Babar and his nephew assigned their mortgage rights, a decree and the lease of the 20th June 1914 to the plaintiff in 1915.

At the trial defendant's pleader contended that the mortgage and lease were void under S. 3, Bhagdari and Narwadari Act, 1862. The learned trial Judge held that the mortgage, the lease and the assignment were all void and dismissed the suit.

In first appeal the learned appellate Judge considered that the question whether the plaintiff could recover turned on the question whether he ever got possession, and remanded the case for trial of issues as to when Margha got physical possession of the land.

The lower Court found that Margha did not obtain physical possession until after March 1905.

It was proved that the defendant mortgagor remained in possession after the mortgage under a lease for ten years. On 11th August 1905 he passed a lease for a moiety of the land (Ex. 27), although he said he remained in possession of the whole. Then for the monsoon of Sambat 1965 he passed a lease for the whole of the land, Ex. 28. On the other hand the mortgagee said he personally cultivated the land in 1961, but took the defendant into partnership and got him to execute Ex. 27, and pursued the same course for three or four years until Ex. 28 was passed in 1965. After that the defendant passed a lease for the whole of the land.

On these findings the learned District Judge came to the conclusion that the vice of the original alienation had not been cured and the suit was not maintainable.

But from the decision in *Javerbhai v. Gordhan* (1) it may be gathered that physical possession is not necessary. In that case the defendant mortgaged a house, which formed an unrecognized division of a bhag, to the plaintiff in 1901 for Rs. 729. The deed of mortgage contained a covenant to pay compensation to the mortgagee in the event of there being any hindrance or obstruction concerning the house. The defendant continued in possession under yearly rent notes. At the determination of the rent note for the year ending July 1909 the defendant refused to surrender possession. On 9th November 1910 the plaintiff sued to recover possession of the house or in the alternative for Rs. 729 as compensation. It was held that the mortgage and the rent notes were void under the provisions of the Bhagdari Act, that the consideration for the mortgage failed ab initio and a suit to recover the money as received for the plaintiff's use was barred under Art. 62, Limitation Act, but it was open to the plaintiff to claim under the covenant, although the mortgage was void. But it was also held that the mortgagee was in adverse possession of the limited interest as mortgagee in possession, and in assertion of that right held adversely to the defendant who continuously attorned to him. It would follow that if such adverse possession had continued for twelve years the plaintiff would have been able to recover possession as mortgagee. If that decision is correct the plaintiff in this case would be entitled to recover as having been in possession for more than twelve years.

The real question is whether the mortgage was void. If it was, the lease for ten years and the rent notes would also be void.

The defendants can plead their illegality in answer to the plaintiff's suit. In *Adam Umar v. Bapu Bavaji* (2) it was held that possession acquired under an alienation made in contravention of S. 3 Bhagdari and Narwadari Act, 1862, can become adverse and bar a suit for recovery by the individual alienor or his representatives-in-interest. In *Jethabhai v. Nathabhai* (3) the plaintiff obtained under a deed of compromise a portion of

a bhag or share in a narwa other than a recognized division of such bhag or narwa. The commissioner held that the alienation was void and put the defendant in possession. The plaintiff then filed the suit claiming to be entitled to succeed by adverse possession. Chandavarkar, J., said:

"But it is of the essence of a title by adverse possession that it must relate to some property which is recognized by law. But here there is no such property, since the legislature has prescribed the kind of property on which the plaintiffs seek to found their title by adverse possession."

In *Javerbhai v. Gordhan* (1) Batchelor, J., distinguished this on the ground that the plaintiffs there contended that they held the land as forming part of the holding and as subject to all the incidents of the tenure. But it is difficult to see how a mortgagee can obtain a title to the mortgage by adverse possession. He is not in possession adversely to the mortgagor, and the very essence of adverse possession is that it must be hostile to the interest of the real owner. What is meant, I suppose, is that the possession is hostile to any defence that may be raised by the mortgagor that the mortgage is void. *Ramchandra Venkaji Naik v. Kallo Devji Deshpande* (4) was a converse case. In 1909 the plaintiff sued to redeem property consisting of watan inam land which had been mortgaged by his grandfather in 1867. The defendants mortgagees contended that the mortgage became void under the Watan Act on the death of the mortgagor in 1873 and that they had been in adverse possession since then. It was held that the mortgagee remained a mortgagee for the purpose of a redemption suit. Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as owner and not as mortgagee, he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely, that of mortgagee. That would be an authority in this case for holding that the defence that the mortgage was void ab initio was not available to the defendant. But the defendant and his assignor having attorned to the plaintiff, I do not think it is open to the defendant in this suit to contend that the plaintiff had no right to let out the property on rent, so

(1) A. I. R. 1915 Bom. 102=39 Bom. 358=29 I. C. 442.

(2) [1909] 32 Bom. 116=1 I. O. 669.

(3) [1904] 23 Bom. 399=6 Bom. L. R. 428.

(4) A. I. R. 1915 Bom. 131=39 Bom. 587=30 I. O. 396.

that, I think, the plaintiff is entitled to the relief he claims. We have nothing to do with the question whether the defendant will be able hereafter to set aside the mortgage, nor with the powers which the Collector has under the Act to avoid the alienation. The appeal is allowed. The plaintiff must be put in possession of the plaintiff land, and there will be a decree for Rs. 39 with costs throughout.

Heaton, J.—I agree that the plaintiff must be awarded possession of the property and one year's rent. We need not, I think, in this case, express any definite opinion on the question of acquiring the rights of a mortgagee by adverse possession. It is a difficult question, and my mind is far from clear on the point. But for other reasons altogether I think the plaintiff must succeed here. The defendant was in the position of a tenant, and it appears from the facts found by the appellate Court that he was placed in possession of this land by the person, the plaintiff, who purports to be the landlord, and his possession since then has been continuously possession of a tenant under a landlord. Where these are the facts, I think that the principle of S. 116, Evidence Act, must prevail, and it must be held that the defendant must surrender possession before he can place himself in a position successfully to plead that the tenancy is void.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 314

SHAH AND HAYWARD, JJ.

In re *Nagindas Chanusa*—Applicant.

Criminal Revn. Appln. No. 256 of 1919, Decided on 14th October 1919 from order of Magistrate, 1st Class, East Khandesh.

Criminal P. C. (5 of 1898), S. 250 (b)—Order made not on same day of order of discharge but postponed at complainant's request is not bad.

The mere fact that an order for compensation is not made on the same day as the order of discharge, but on a subsequent day fixed on the application of the complainant for an adjournment to show cause in response to a notice issued on the same day on which the accused was discharged, would not make the order bad for non-compliance with the provision contained in Cl. (b), S. 250, Criminal P. C. [P 314 C 2]

Ratanlal Ranchhodas—for Applicant.

Shah, J.—The only question in this application is as to the order of compensation. On the merits there is nothing to be said in support of the application.

But it is argued that, as the accused were discharged on 13th January and the order of compensation was made on 28th January, the provisions of S. 250, contained in Cl. (b) of the proviso, have not been complied with inasmuch as the Magistrate has not stated in writing in his order of discharge or acquittal his reasons for awarding compensation. It is argued that in consequence of this non-compliance with the provisions of the section the order is bad. No doubt the wording of the clause lends colour to the argument urged on behalf of the applicant. But in this case the notice to the complainant to show cause why an order of compensation should not be made against him was given on the same day as the order of discharge and practically in the same proceeding. The order of compensation was made, after hearing the complainant some days later, below the order of discharge. On these facts it seems to me that Cl. (b) of the proviso has been sufficiently complied with; and that the Magistrate in directing the compensation to be paid has stated in writing practically in his order of discharge his reasons for awarding the compensation. The mere fact that the order came to be made some days after the order of discharge does not, in my opinion, affect the question. This view seems to accord with the view taken by this Court in *Emperor v Punamchand* (1). The only differentiating fact here is that the order of compensation was made not on the same day as the order of discharge, but on a subsequent day fixed on the application of the complainant for an adjournment to show cause in response to the notice which was issued on the same day on which the accused were discharged.

I would accordingly discharge the Rule.

Hayward, J.—I concur. The compensation order is part of the order of discharge, though completed some days later. The common sense view ought, in my opinion, to be taken of the obvious intentions of the provisions of S. 250, Criminal P. C. This was the view held when the order which was on different pieces of paper was held to be one order by this Court in the case of *Emperor v Punamchand* (1). The contrary and highly technical view taken by single Judges of the Allahabad High Court in

(1) [1906] 8 Bom. L. R. 847=4 Cr. L. J. 423.

the cases of *Safdar Husain*, *In the matter of the complaint of (2) and Ram Singh v. Mathura (3)* was not followed in a subsequent case before the Allahabad Bench in the case of *Ghurbin Koeri v. Khalil Khan (4)*. They got over the difficulty in that case by having recourse to S. 537, Criminal P. C. My own view is that upon a practicable interpretation of the provisions of S. 250 it would not really be necessary to have recourse even to the saving provisions of S. 537, Criminal P. C.

G.P./R.K.

Rule discharged.

(2) [1903] 25 All. 315=(1903) A. W. N. 57.

(3) [1912] 34 All. 354=14 I. C. 599.

(4) A. I. R. 1914 All. 86=86 All. 132=22 I. C. 977.

* A. I. R. 1920 Bombay 315

SHAH AND HAYWARD, JJ.

Emperor

v.

J. B. H. Johnson—Accused—Respondent.

Criminal Appeals Nos. 119 to 135 of 1919, Decided on 26th June 1919, from orders of Sess. Judge, Ahmedabad.

*Factories Act (12 of 1911), S. 41 (a)—Object is to prohibit employment of persons to work contrary to Act—Employment of several persons contrary to law constitutes complete and separate offence in respect of each person so employed—Case is not governed by Penal Code (45 of 1860), S. 71.

The language of S. 41 (a), Factories Act, indicates that what is prohibited is the employment of any person or allowing any person to work contrary to the provisions of the Act, that is to say, it is an offence to employ any person, or allow him to work, contrary to the provisions of the Act. Therefore where several persons are so employed, the offence is complete and separate in respect of each person employed or allowed to work contrary to any of the provisions of the Act. [P 316 C 1]

To such a case the provisions of S. 71, I. P. C., have no application, because the offence of each workman is distinct and separate and there is not one offence collectively merely by the fact of a number of these offences having been committed at the same time. [P 316 C 2]

S. S. Patkar—for the Crown.

Chimanlal Setalvad—for Accused.

Shah, J.—The facts which have given rise to these appeals are few and undisputed.

On 4th September last, at about 11-30 p. m., 18 persons were found working in the Calico Mills, which is a textile factory subject to the provisions of the Factories Act 12 of 1911. Eighteen complaints were lodged in respect of the em-

ployment of these 18 persons against the manager of the said factory. The accused pleaded guilty, and he was convicted in all these 18 cases and sentenced to pay a fine of Rs. 100 in each case. On appeals to the Sessions Court the learned Sessions Judge upheld the conviction in the first of these cases and set aside the convictions and sentences in the remaining 17 cases. He was of opinion that the offence was one of employment of labour collectively and that it was not a separate offence to employ each person contrary to the provisions of the Act.

It is in these 17 cases, in which the accused has been acquitted by the Sessions Court, that the present appeals are preferred by the Government of Bombay. The question of law that arises is whether under S. 41 (a) of the Act the offence consists of the employment of labour apart from the number of men employed, or whether the offence is complete and separate in respect of each person employed or allowed to work contrary to any of the provisions of the Act.

It has been argued on behalf of the Crown that under S. 29 of the Act no person can be employed in any textile factory after 7 o'clock in the evening; that under S. 41 (a), if in any factory any person is employed or allowed to work contrary to the provisions of the Act, the manager is liable to fine which may extend to Rs. 200; and that the offence is distinct in respect of every person employed or allowed to work contrary to the provisions of the Act. It is further contended that neither the terms of S. 45 of the Act nor the corresponding provisions of the English Statute (1 Edw. 7, c. 22, S. 135) support the conclusion at which the lower appellate Court has arrived.

On behalf of the accused it has been urged that the general scheme of the Act, including the provisions relating to the textile factories, indicates that the prohibition is not in respect of any individual, but in respect of the labour collectively, and that therefore an offence under S. 41, Cl. (a), is not the offence of employing each individual but the offence of employing one or more workmen at a time. It is also urged that S. 45 of the Act lends support to that view. It is further argued that in any case the provisions of S. 71, I. P. C., are applicable to this case and that there should be

only one punishment in respect of all these offences, even if the act of employing each of these persons is treated as a separate act.

After a consideration of these arguments I am clearly of opinion that the contention urged on behalf of the Crown must be allowed. The words of S. 41 (a) are clear and indicate, in my opinion, that what is prohibited is the employment of any person or allowing any person to work contrary to any of the provisions of the Act. That would mean that it is an offence under S. 41 (a) to employ any person or to allow him to work contrary to the provisions of the Act. In the present case, there is no doubt that all these eighteen persons were employed contrary to the provisions of S. 29, sub-S. 1. It is not suggested that any of the exceptions contained in sub-S. (2), S. 29 or in S. 30 of the Act are applicable to the facts of the present case. The accused has pleaded guilty to the charges, and there is no doubt that the employment of each one of these seventeen persons was contrary to the provisions of S. 29, sub-S. 1. The employment of each person must be treated as a distinct act, and the fact that eighteen persons were employed at one time cannot make the employment of these persons one act of employment. The argument based on the scheme of the Act seems to me to be open to the objection that it ignores the clear phraseology of Ss. 29 and 41, Cl. (a), and that it involves the assumption that the object of the Act is to regulate the working of the mills and the employment of labour collectively and not necessarily to secure protection for the workmen employed in the factory individually. There is no justification for such an assumption.

On the other hand, it is a fair view to take that these provisions are intended, among other things, to protect the persons employed in the factory and that the result can be effectively secured if they are read as applying individually and not collectively. As regards S. 45 of the Act, I think that it has no application to the present case, and that it throws no light on the point under consideration. It applies in terms to a repetition of the same kind of offence from day to day and not to offences of the same description on the same day. The words of Cl. (b), S. 45, must be read with

reference to the purpose of the section, and cannot be allowed to control the plain meaning of S. 41, Cl. (a). It is significant that in Cl. (b) in the corresponding S. 143 of the English Statute the same phraseology is used, even though under S. 137 of that Act the penalty is provided for each person employed.

The provisions of S. 71, I. P. C., in my opinion, have no application to this case. If the offence consists of employing the labour collectively after the prescribed hour, no resort to S. 71 is necessary. If it is an offence to employ each workman, S. 71 cannot apply. Para. 1 of the section applies to a case where a repetition of the same offence constitutes in the result the same offence. This is indicated by Illus. (a). In the present case the offence, if it consists of employing each workman, is distinct and separate and there is no one offence collectively merely by the fact of a number of these offences having been committed at the same time.

The ground upon which the learned Sessions Judge has based his conclusion is that under the repealed Indian Factories Act of 1881, there was an express provision that the offence would be in respect of each individual employed. That, no doubt, was expressly provided as an exception to a proviso which existed in the Act of 1881 and also in the amended section in the Act of 1891. But in the new Act the proviso including the exception is omitted. I do not think that the omission suggests the inference which the lower appellate Court has drawn. It was apparently to modify the plain meaning of the words of the principal part of the section that the proviso was inserted and even then an exception was made as regards the offence of employing each person. In my opinion the omission to re enact the proviso rendered the exception unnecessary. Thus the omission has the effect of leaving the words used in the section to indicate their plain and natural meaning, that it would be an offence to employ any person contrary to the provisions of the Act. I cannot agree with the learned Sessions Judge in his suggestion that all the offences indicated in other clauses of S. 41 are single offences. I am unable to read all the other clauses of the section in that sense. For instance, it is difficult to accept, as has been suggested in the

course of the argument before us, that under Cl. (a), S. 41, which makes it an offence to construct any door in contravention of S. 15, it would be only one offence whether one door is constructed in contravention of S. 15 or several doors are so constructed. I do not however desire to pursue this line of argument, nor to express any definite opinion as to the interpretation of any other clause of S. 41, as that is not strictly necessary for the purpose of this case. I am content to take the words used in Cl. (a) with which we are concerned in this case and to interpret them in their natural and plain sense.

I have no doubt therefore that the convictions in these seventeen cases recorded by the trial Magistrate were right and that the acquittals are wrong.

The result is that the orders of the lower appellate Court in these seventeen appeals are set aside and the convictions recorded by the trial Magistrate restored.

As regards the sentences, while it is right that the total fine in respect of these several offences should be substantial, it should not be excessive. The record does not disclose all the circumstances connected with the employment of eighteen persons on this particular occasion. On the whole we think that the sentence of Rs. 50 in each of these seventeen cases would be sufficient to meet the ends of justice. We accordingly order that the accused be sentenced to pay a fine of Rs. 50 in each of these seventeen cases and in default of payment to undergo simple imprisonment for fifteen days.

Hayward, J.—These appeals raise the question whether the manager of a factory commits one or several offences by employing several persons illegally under S. 41 (a), Factories Act 12 of 1911.

It seems to me that he commits several offences according to the plain meaning of the words used. But it has been argued that a different meaning ought to be implied and that regard ought to be had not to the number of persons employed, but only generally to the employment. The argument is based on reasoning put forward, not without hesitation, by the learned Sessions Judge who relied upon the provisions of S. 15 of the old Act of 1881 as amended by

Act 11 of 1891 and upon the provisions of S. 45 of the present Act 12 of 1911.

It seems to me however that the commission of several offences by the employment of several persons was also the plain meaning of the similar words used in the old Act of 1881 as amended by the Act of 1891. There was no necessity otherwise for the proviso restricting the plain meaning, except in the particular instance of the employment of two or more persons, to several offences committed on different days. The effect of the exception was merely to limit the proviso and therefore could not be affected by the repeal of the proviso. The necessity of the exception ceased with the repeal of the proviso. It could not therefore be implied that the plain meaning of the words was not intended by reason of the omission of the proviso of the old Act from S. 41 of the present Act of 1911.

It seems to me again that the commission of several offences on a particular day would nonetheless render the offender liable to separate punishments because a repetition of those offences on succeeding day has specially been stated to involve liability for further punishments by the subsequent S. 45 of the present Act of 1911. It is no doubt difficult to explain why this particular provision was limited to the employment of two or more persons. But whether this was merely a slip in drafting, as would appear to me probable, or whether it was intentional, would make no difference, because the repetition of offences on subsequent days has alone been in view in S. 45 of the present Act of 1911.

It was also argued that more than one punishment could not be inflicted for the several offences by reason of the provisions of S. 71, I. P. C. But it seems to me that that argument merely begged the question. Those provisions could only apply if there were not several offences in the employment of several persons, but merely the general offence of employment. They would not restrict the infliction of punishment in respect of the employment of several persons if this involved several independent offences, but would only restrict the punishment if they involved merely the general offence of employment. It seems to me that recourse could not be had to S. 71, I. P. C.

It seems to me lastly that substantial punishments were necessary in view of what has been stated both by the Magistrate and the learned Sessions Judge. The punishment proposed, which would approximate in the aggregate to a fine of Rs. 1,000, should be a sufficient punishment for infliction by this Court.

G.P./R.K.

*Orders set aside.***A. I. R. 1920 Bombay 318**

SHAH AND HAYWARD, JJ.

In re Arjun Tathoo—Applicant.

Criminal Revn. Appln. No. 251 of 1919, Decided on 14th October 1919, from order of 1st Class Magistrate, East Khandesh.

Criminal Trial—Appeal—Notice—What is not sufficient notice of hearing of appeal stated.

An appellant is entitled to reasonable notice of the date and place of hearing of his appeal. A notice to an appellant's pleader that his appeal would be heard next day, wherever the Court happened to be encamped, is not reasonable or sufficient. [P 318 C 1, 2]

V. D. Limaye—for Applicant.

S. S. Patkar—for the Crown.

Shah, J.—In this case the petitioners before us were asked to furnish security by the First Class Magistrate on 31st January 1919 under S. 110, Cls. (a) and (b), Criminal P. C. The petitioners appealed to the District Magistrate, and it appears from an endorsement on the petition of appeal, dated 17th March, that notice was ordered to be issued to the pleader for the accused and to the Public Prosecutor to appear on 22nd March. This endorsement does not appear to be signed. It further appears that the notice was served on the pleader for the petitioners at Amalner in the afternoon of 21st March to be present at Jalgaon or any other place where the camp of the District Magistrate may be on the 22nd. On 22nd March the District Magistrate dismissed the appeals, remarking that there was no appearance and that he saw no grounds for interference with the Sub-divisional Magistrate's finding.

It seems that there was not sufficient notice to the pleader for the accused to be able to appear on 22nd March. The notice was served in the afternoon of the 21st, and the place where he was to appear was not definitely mentioned. Having regard to the facts disclosed in the judgment of the trial Magistrate, it seems to me that this case required to be examined on the evidence by the Dis-

trict Magistrate; and the endorsement that the notice was to be issued to both the parties shows that the District Magistrate also decided to hear the appeals and did not summarily dismiss them.

In view of the fact that the appeals have been disposed of in the absence of the petitioners and that there was not sufficient notice of the date and the place of hearing to their pleader, I am of opinion that the order made by the District Magistrate dismissing the appeals should be set aside and the appeals should be sent back to his Court for disposal according to law.

Hayward, J.—I agree. The applicants' case was one demanding careful consideration. It arose out of factions in the village, which have led to quarrels between the parties which had obviously been exaggerated from mere mischief into habitual thefts. It was moreover apparently recognized that there should be a full hearing, as notice for a regular hearing had been issued by the learned District Magistrate. It unfortunately however turned out that the time given in the notice was not sufficient. The notice was not received until the afternoon of 21st and required the pleader to appear on 22nd either at Jalgaon or at whatever camp he might find the District Magistrate. It has been admitted that the camp was then a long way from Jalgaon. So there really was not reasonable time to appear for the hearing before the District Magistrate. The result was that the parties were deprived of the benefit of having their pleas properly represented by their pleader. It is true that in the case of one only has the time for which the security was taken not expired. But there ought, in my opinion, in any case to be a regular hearing as regards that one, and as regards the other four, it is a matter of considerable importance to them in regard to their position in their village, and it seems to me desirable therefore to send the case back in order that there should be the regular hearing which was originally contemplated by the learned District Magistrate.

G.P./R.K.

Order set aside.

* A. I. R. 1920 Bombay 319

SHAH AND CRUMP, JJ.

Rajaram Bhavanishankar and another
—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. Applns. Nos. 110 and 113 of 1920, Decided on 12th July 1920, from order of Sess. Judge, Ahmedabad.

* (a) Penal Code (45 of 1860), S. 192—Judicial proceedings need not be pending at time of fabrication—Intention to use in such proceedings is enough.

It is not essential for the purpose of S. 192, that there should be any judicial proceeding pending at the time of the fabrication. It is enough that there is a reasonable prospect of such a proceeding, having regard to the circumstances of the case, and that the document in question is intended to be used in such a proceeding. [P 320 C 1, 2]

(b) Penal Code (45 of 1860), S. 193—Fabrication of false rent-note — Offence under S. 193 is complete.

A person who fabricates a false rent-note showing that a house has been let to him for a certain period is guilty of an offence under S. 193, I. P. C. [P 320 C 2]

Coyaji, G. N. Thakor, Dhirajilal K. Thakor and Ratanlal Ranchhodas—for Accused.*S. S. Patkar*—for the Crown.**Shah, J.**—These are two applications in revision arising under the following circumstances:

Accused 1 was in possession of a house at Dakore under a rent-note, dated 13th of July 1918. The house belonged to the complainant, Bai Dhiraj. That rent-note expired in June 1919, and Bai Dhiraj asked accused 1 to vacate the house. About this time a document, Ex. 10 in the case, is said to have been fabricated by accused 1. That document purports to be a rent-note executed by accused 1 in favour of Bai Dhiraj. It purports to have been executed on 14th June 1919, and the terms of the document indicate that Bai Dhiraj had let the house to him for four years on an annual rental of Rs. 30. This document was presented for registration by accused 1 on 17th June and on his admission of the execution of the document, it was registered on that day. Bai Dhiraj however was anxious throughout to get possession of the house and in the course of her efforts to get accused 1 to vacate the house, she came to know of the document which was presented for registration on 17th June. The document was written by accused 2 and attested by accused 3 and

one other person. After taking advice in the matter, Bai Dhiraj lodged a complaint on 10th July 1919 against accused 1, her tenant accused 2, the writer of the document, and accused 3, one of the attestors of the document. Bai Dhiraj repudiated all knowledge of the document and maintained that the document was false.

The defence of accused 1 which was supported by the other accused, was that the document was written with the consent and knowledge of Bai Dhiraj. There was considerable evidence on both sides and as a result of the consideration of the evidence, the Trial Magistrate came to the conclusion that the document was false. Accordingly he convicted all the three accused under the first part of S. 193 for fabricating false evidence for the purpose of being used in a judicial proceeding and sentenced the accused to different terms of imprisonment and fines. The accused appealed to the Sessions Court at Ahmedabad, and the learned Sessions Judge found the facts generally in favour of the prosecution, confirmed the convictions of accused 1 and 2, felt a doubt as to the guilt of accused 3 and acquitted him. The sentences were modified by the Sessions Judge as to accused 1 and 2.

Now accused 1 and 2 have applied to this Court in revision. Two points have been urged in support of his application on behalf of accused 1 Rajaram Bhavanishankar. First, it is urged that one of the essential conditions required under S. 192, I. P. C. for fabricating false evidence is, that there should be an intention on the part of the person fabricating the document that such document so appearing in evidence may cause any person who in such judicial proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding. It is urged that this condition is not satisfied in this case and is not capable of being satisfied, as the document said to have been fabricated would be inadmissible in evidence; secondly, it is urged that there was no judicial proceeding in existence at the time and nothing to show that there was any judicial proceeding contemplated at the time and that therefore it could not be said that it was intended that the document in question should appear in

evidence in a judicial proceeding, or that the document was fabricated for the purpose of being used in any stage of a judicial proceeding.

As regards the first point, the whole argument is based upon the proposition that the document in question, which is a rent note, is inadmissible in evidence, and certain decided cases have been referred to in support of the further proposition that in case the document fabricated is inadmissible in evidence, the last condition required under S. 192 cannot possibly be satisfied. I am however unable in this case to accept the first proposition that the document is inadmissible in evidence. The document purports to be a rent-note executed by accused 1 in favour of Bai Dhiraj and as such it contains an admission against the interest of the person purporting to execute it. Accused 1 admits therein that he is a tenant. He admits his liability to pay certain annual rent. In my opinion, it is an entirely untenable position that this document could not be admitted in evidence, because it would be an admission by the accused 1 in his own favour. As I take this view as to the admissibility of the document in question, I do not consider it necessary to examine the further part of the argument which is based upon certain decided cases, and I express no opinion thereon. I feel quite clear that the first contention must be disallowed.

As regards the second contention, it is true that no judicial proceeding was pending at the time. It is also true that no notice was given by Bai Dhiraj threatening to take any judicial proceeding against accused 1. But it is clear from the evidence that Bai Dhiraj then insisted upon accused 1 vacating the house and for one reason or other the tenant was anxious to hold on to the house. Under these circumstances, it is quite a reasonable inference that in case of his refusal to vacate, there would be an ejectment suit by Bai Dhiraj against him and the only reasonable purpose for which the document which accused 1 took the trouble of getting registered could be said to have been intended is its use in a judicial proceeding which might be initiated against him. It is not essential for the purpose of S. 192 that there should be any judicial proceeding pending at the time of the fabrication. It is

enough that there is a reasonable prospect of such a proceeding having regard to the circumstances of the case, and that the document in question is intended to be used in such a proceeding. The fabrication in the present case satisfied the requirement of S. 192 as to the intention to use the document in a judicial proceeding. I have no doubt that both the lower Courts are right in holding that accused 1 intended that this document should be used in a judicial proceeding.

Lastly, on his behalf it was urged that the finding of the lower appellate Court on the evidence was largely based upon probabilities. But having regard to the reasons given by the learned Sessions Judge in support of his finding it is clear that it is based upon evidence and in revision we must accept the finding that Bai Dhiraj never consented to allow accused 1 to continue as a tenant and never consented to the rent-note being executed by accused 1 in her favour. There is no doubt, therefore as to the correctness of the conviction of accused 1.

As regards the sentence, it seems to me that practically, nothing was done in respect of this document. The whole thing came to be known before accused 1 could make any use of the document, and in view of all the circumstances connected with the case, I am of opinion that the sentence may properly be reduced to rigorous imprisonment for six months.

I would accordingly confirm his conviction, and reduce the sentence to rigorous imprisonment for six months.

As regards accused 2 Nagarbbhai Talsibhai, he is a professional writer of documents and undoubtedly he wrote the rent-note in question. Beyond the general suggestion that he is on friendly terms with accused 1 there is no evidence in the case to show that at the time he wrote this document, he had any guilty intention or knowledge. Such a document might well be written by a person in the position of accused 2 either at the instance of Bai Dhiraj or of Rajaram, accused 1. Apart from the defence which he made in this case, there is nothing in the evidence to prove any guilty intention on his part. The lower appellate Court has confirmed his conviction on the ground that he stated in his defence that the document was written at the instance

of Bai Dhiraj. This defence is found by the lower appellate Court to be false and must be accepted as being false for the purposes of this application. I do not think however that his making such a false defence, when he was being jointly tried with accused 1, is a sufficient basis for supplying the lacuna which undoubtedly exists in the prosecution case so far as accused 2 is concerned. The explanation which is offered by an accused person under S. 342, is after all to explain the evidence against him, and in the present case I do not think that, really, there was any evidence against accused 2 to show his guilty intention. Under these circumstances, I do not think that it would be fair to press the false explanation offered by him at the trial, against him to the extent to which it has been pressed by the lower appellate Court. The lower appellate Court took, in my opinion, a reasonable view as to the case of accused 3 and should have taken the same view of the position of accused 2. In his case I do not think that the charge is established.

I would therefore set aside his conviction and sentence, acquit him and direct his bail-bond to be cancelled.

Crump, J.—I concur.

G.P./R.K.

Order accordingly.

A. I. R. 1920 Bombay 321

MACLEOD, C. J. AND HEATON, J.

Govind Narain Rao Desai—Defendant—Appellant.

v.

Vallabhrao Narayanrao Desai—Plaintiff—Respondent.

Appeal No. 48 of 1918, Decided on 10th November 1919, from appellate order of First Class Sub-Judge, Dharwar, in Suit No. 459 of 1915.

Civil P. C. (5 of 1908), O. 40, R. 1—Partition suit—Receiver when can be appointed stated—Hindu Law, partition.

As a general rule the Court will not, in a partition suit between members of a joint family appoint a receiver except by consent, and upon proof by the plaintiff that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in the plaint, and that the property in possession of the opposite party is in danger of being wasted. The mere fact that there is a dispute is no reason whatever for appointing a receiver. [P 321 C 2]

R. A. Jahagirdhar—for Appellant.

H. B. Gumaste—for Respondent.

Judgment.—The parties in this case are brothers, and there is no doubt that

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the relations between them are strained. The defendant is in possession of the family property. The plaintiff seeks partition. All sorts of claims evidently have been made by the plaintiff, alleging that the family properties are of far greater value than the amount admitted by the defendant. It is also alleged that the defendant has been grossly mismanaging the family property, and on that account it appears that in 1915 the plaintiff got an injunction from the Court restraining the defendant from dealing with the property. In 1916 he got an order appointing a receiver, and the Court appointed the Collector receiver, and the Collector imposed certain conditions involving expense which the plaintiff was not inclined to pay. The result was that the order appointing a receiver remained in abeyance until 1918 when eventually the expenses were provided for, and the Collector consented to be appointed receiver. From that order the defendant appeals. We have before us no grounds whatever upon which the Judge made the order appointing a receiver. The only ground, as far as I can see after hearing the argument, was that the relations between the plaintiff and the defendant were strained.

Now, generally speaking, in a partition suit between members of a joint family the Court will not appoint a receiver except by consent, and especially where the family property consists of land. So in order that a receiver should be appointed of joint family property in a partition suit, special circumstances will have to be proved before the Court will be entitled to appoint a receiver. Generally speaking, when an application is made to the Court to take the property into its hands by appointing a receiver, the plaintiff must prove that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in his plaint, and in the next place he must satisfy the Court that the property in possession of the opposite party is in danger of being wasted. With regard to the property in this suit it appears that a considerable amount of immovable property, and the defendant's share would be ample security for any claim which the plaintiff would be able to substantiate in the case for damages, or under any other cause of action against the defendant. Then the plain-

tiff alleges that a certain shop belongs to the family. The defendant denies that the shop is joint family property. Therefore there is a dispute as regards that shop. The mere fact that there is a dispute is no reason whatever for appointing a receiver. The plaintiff must show that *prima facie* the shop does belong to the family. I asked him what the name of the shop, because if it belonged to the family, it would naturally be carried on in the name of the family. But it appears that the shop is not carried on in the name of the family, and in any event the Collector is not the most suitable person to carry on a cloth shop or any other shop, instead of the party who is in possession. It is always open to the Court to ask the party in possession to file an inventory and to keep accounts. There are no materials from which I can form any certain opinion that a receiver should be appointed. I am told that there are ornaments and there are mortgages. But in any event those properties are still in dispute, and the same reasons, which I have shown are applicable to the question whether a receiver should be appointed of the land and the shop, apply with regard to ornaments and mortgages.

All these questions will be determined when the suit comes on for hearing, and then the Court will be in a much better position to form an opinion as to whether the Court should take possession of the property until the dispute is finally decided. As far as I can see, as an interlocutory measure, the Court had not sufficient grounds for taking the property into its own possession and depriving the defendant of possession of the property. In my opinion therefore the order was wrongly made and must be set aside. The property must be restored to the possession of that party from which it came. Costs of the appeal will be costs in the cause.

G.P./R.K.

*Order set aside.***A. I. R. 1920 Bombay 322**

SHAH AND HAYWARD, JJ.

Emperor

v.

Maruti Santu More—Accused.

Criminal Appeal No. 410 of 1919, Decided on 22nd July 1919, against order of Addl. Sess. Judge, Satara.

(a) Criminal P. C. (5 of 1898), S. 164—**Confession before Magistrate not reduced to writing—Oral evidence is not admissible.**

(Per *Shah, J.*)—A confession made to a Magistrate during the course of an investigation which is not reduced to writing is inadmissible in evidence and cannot therefore be proved by oral evidence. [P 325 C 1]

(b) Evidence Act (1 of 1872), Ss. 21, 26, 80 and 91—**Oral confession is admissible under Ss. 21 and 26 and can be proved by oral evidence.**

(Per *Hayward, J.*)—An oral confession made to a Magistrate is *prima facie* relevant under Ss. 21 and 26, Evidence Act, though it has to be proved by oral testimony and not by the production of any writing duly recorded by any Magistrate under S. 80, Evidence Act. [P 329 C 1]

S. S. Patkar—for the Crown.

M. H. Mehta—for Accused.

Shah, J.—In this case two persons were charged in connexion with the murder of a forest guard, named Aba Gudhan, accused 1 with the murder under S. 302, I. P. C., and accused 2 with the abetment thereof under Ss. 302 and 114, I. P. C., and with causing the evidence of murder to disappear under S. 201, I. P. C. They were tried by the Additional Sessions Judge of Satara with the aid of assessors. The assessors were of opinion that accused 1 was guilty of murder and that accused 2 was not guilty of the abetment thereof; but they were divided in opinion as to the guilt of accused 2 on the charge under S. 201, I. P. C. The learned Judge found that the charge against accused 1 was not established, and accordingly acquitted him. He also found that the charge of the abetment of murder against accused 2 was not proved and acquitted him of that charge; he found him guilty under S. 201 and sentenced him to rigorous imprisonment for four years.

The Government of Bombay have appealed against the acquittal of accused 1 and we are now concerned with his case only.

It is not necessary to set forth the prosecution case in detail. The general outlines of the story have been stated in Para. 2 of the judgment of the lower Court at p. 51 of the print which I adopt for the purpose of this judgment.

It is found by the trial Judge that the deceased Aba left Umerkanchan on 23rd November 1917 for Kolekarwadi and was murdered on his way to that place on the very day, and this is not now disputed. The question in this appeal is

whether accused 1 is shown to be the murderer as alleged by the prosecution.

It is urged in support of the appeal, first, that the oral confession made by accused 1 to the 2nd Class Magistrate of Patan on 1st January 1918 has been wrongly excluded from consideration and that the said confession is true and voluntary; secondly, that the lower Court is wrong in treating the evidence of certain witnesses (Exs. 21 and 25) as unreliable as regards accused 1; thirdly, that accused 1 pointed out the scene of offence where some blood-stains and the upper end of an umbrella, which it is suggested is the broken end of the deceased's umbrella, were found, and lastly, that the confession of accused 2 supports the prosecution case.

The first point relating to the admissibility of the oral confession raises an important question of law. In the lower Court the Public Prosecutor did not rely upon this confession. It has been relied upon by the learned Government Pleader here, and the question of its admissibility has been fully argued before us.

The facts which led up to the confession are these: The murder was committed on 23rd November 1917. The fact of the murder was known on 4th December, when the dead body was discovered in the limits of Karale, some miles away from Kolkarwadi. The Police investigation commenced on 20th December and until 30th December apparently nothing was known about the offenders. On 31st December accused 1 was arrested, and on the following day he was sent to the Second Class Magistrate at Patan for a remand. The evidence of the Magistrate is as follows:

"The Sub-Inspector of Malhar Peith sent to me accused 1 Maruti Santu on 1st January 1918 for a remand. I understand that report to mean that the police wanted that accused 1 should be remanded to their custody. Then I questioned accused 1. I also asked him if he was ill treated or tortured by the police. Accused 1 complained of no torture or ill-treatment. I questioned accused 1 in respect of some property referred to in the Police Sub-Inspector's report. I did not reduce that statement to writing, as there is a circular order of the District Magistrate prohibiting Magistrates from recording confessions in cases which are not triable by them. The statement which accused 1 made to me was a voluntary statement on his part. I refused to hand over accused 1 to police custody and kept him in my custody until he was sent to the Subdivisional Magistrate on 9th January 1918."

It is clear that the alleged confession was made in the course of the police investigation and before the inquiry or the trial commenced. It could have been recorded under S. 164, Criminal P. C., but was not recorded. The question is whether any oral evidence in proof of the confession is admissible or, in other words, whether the confession is required by law to be reduced to the form of a document within the meaning of S. 91, Evidence Act.

At the outset I may mention that in my opinion the reason assigned by the Magistrate for not recording the confession does not affect the question of law. The circular of the District Magistrate referred to by the witness is not before us; and I am not prepared to accept the statement of the witness as accurately representing the effect of the circular. If what he states be right, the District Magistrate has issued a circular which is directly opposed to the explanation to S. 164, Criminal P. C., which provides that it is not necessary that the Magistrate recording a confession should be a Magistrate having jurisdiction in the case. It is quite possible that the so-called circular is merely a recommendation to the Magistrates to see that the directions contained in Supplemental Criminal Circular No. 17, Cl. 2-C, for the guidance of the police are duly followed. But whatever the circular may be, it cannot change the provisions of S. 164 and it has no legal effect so far as the present point is concerned.

I shall first consider the provisions of the Evidence Act and the Code of Criminal Procedure bearing on this point without any reference to the reported cases. The generality of the provisions of S. 21, Evidence Act, relating to admissions is qualified by the provisions of Ss. 24 to 29 relating to confessions. S. 25 renders any proof of a confession made to a police officer inadmissible. S. 26 provides that no confession made by a person while he is in police custody can be proved against him unless it be made in the immediate presence of a Magistrate. This is subject to the provisions of S. 91, which provides that no evidence shall be given in proof of any matter which is required by law to be reduced to the form of a document except the document itself or secondary evidence of its contents when that is admis-

sible. In the present case it is clear that no evidence is admissible to prove the contents of the confession, if the confession is a matter required by law to be reduced to writing. This brings me to the provisions of S. 164, which provides for the recording of confessions in the course of an investigation under Ch. 14 or thereafter, before the commencement of the inquiry or trial. It is urged that the provisions of S. 164 are merely permissive and have no compulsory force, as the expression used in sub-S. (1) is "may record." The confession in question was such as could have been recorded under S. 164 by the Magistrate. On a consideration of the provisions of the section and its obvious purpose it seems to me to be clear that such a confession is a matter required by law to be reduced to writing within the meaning of section S. 91, Evidence Act. Sub-S. (2) provides that such confessions (i.e., confessions referred to in sub-S. 1) shall be recorded and signed in the manner provided in S. 364. The words of S. 364 are mandatory.

Sub-S. (3) requires that no confession shall be recorded unless the Magistrate has reason to believe that it is voluntarily made. The terms of the memorandum which the Magistrate is required to make at the foot of the record show the anxiety of the legislature not only to see that a confession is voluntarily made and that it is accurately recorded, but to convey an assurance with the record that the Magistrate making it was in fact satisfied at the time both as to its voluntary nature and as to its containing a full and true account of the statement. Taking the provisions of the section as a whole it seems to me that though the Magistrate has the power to refuse to record it if he is not satisfied that it is voluntarily made, he has no such option where he is satisfied that it is voluntarily made. The expression "may record" appears to have been used as the Magistrate has to ascertain whether the confession is voluntarily made. The section is no doubt permissive in that sense. But it is obligatory in the sense that it must be recorded if it is found to be voluntarily made. It is hardly consistent with the purpose and terms of the section to hold that the Magistrate has the option of refusing to record it, even when he is

satisfied that it is voluntarily made, if it is to be proved as a confession later on.

The provisions of S. 533 have no direct application to the present case. But both its terms and its existence indicate, if at all, that a confession under S. 164 requires to be made in writing. Under this section oral evidence is admissible under certain circumstances when the record of the confession does not satisfy the requirements of S. 164. But the section has no application where there is no record of the confession and no attempt whatever has been made to comply with the provisions of S. 164. The fact that a provision is made to admit evidence within certain defined limits tends to indicate that no evidence outside those limits is intended to be admitted. Further the last clause of S. 533, which refers to S. 91, Evidence Act, also tends to show that the legislature has impliedly acquiesced in the view that the record of a confession would be a matter required by law to be reduced to the form of a document.

In my opinion this construction of S. 164 is permissible in view of the observations in Maxwell on the Interpretation of Statutes, pp. 388, 389 (Edn. 5):

"Statutes which authorize persons to do acts for the benefit of others or, as it is sometimes said, for the public good or the advancement of justice have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that 'they may' or 'shall if they think fit' or 'shall have power' or that 'it shall be lawful' for them to do such acts a statute appears to use the language of mere permission; but it has been so often decided as to become an axiom that in such cases such expressions may have—to say the least—a compulsory force and so would seem to be modified by judicial exposition. On the other hand in some cases the authorized person is invested with a discretion and then those expressions seem divested of that compulsory force and probably that is the *prima facie* meaning."

It is needless to cite instances of other statutes, in which the word "may" is held to have a compulsory force, as after all whether the word "may" has a compulsory force in a particular statute must depend upon the terms and the purposes of that statute.

An examination of the corresponding provisions of the Code of 1872 in the light of the decisions under that Code appears to me to support the same inference. Ss. 122 and 346 of that Code correspond roughly to the provisions of

Ss. 164 and 364 in the Code of 1882 and in the present Code. In the Code of 1872 there was no separate section corresponding to S. 533 of the Codes of 1882 and 1898; but the last paragraph of S. 346 contained provisions of a limited scope which in the Codes of 1882 and 1898 took the wider form of S. 533. Under the Code of 1872 it was held by a Full Bench of this Court, and the view was followed in other cases, that where the record of a confession was inadmissible in evidence owing to some defect in recording it, no evidence was admissible to prove the terms of that record and that a confession was a document that was required by law to be reduced to writing for the purpose of S. 91, Evidence Act: see *Reg. v. Bai Ratan* (1), *Reg. v. Daya Anand* (2), *Reg. v. Shivya* (3) and *Empress v. Daji Narsu* (4). In each of these cases there was some record of the confession which was held to be inadmissible. But the point of these decisions, as I read them, so far as it is relevant to this case, is that in spite of the use of the word "may" in S. 164 the confession was held to be a document required by law to be reduced to writing within the meaning of S. 91. It is likely that S. 533 was enacted to relax the rigour of this view. This section is more comprehensive than the last paragraph of S. 346 of the Code of 1872. The history of these provisions suggest an inference in favour of the view which I take of S. 164.

I may refer here to two decisions of the Chief Court of the Punjab which the learned Government Pleader has invited our attention to. That Court held in *Shere Singh v. Empress* (5) and *Buta v. Empress* (6) in effect that S. 164 merely authorized but did not require the Magistrate to reduce the confession to writing and that oral evidence to prove it was admissible. The later decision was under the Code of 1882 and there was some record, though a defective record, of the confession. The evidence sought to be admitted was clearly within the scope of S. 533 of the Code of 1882. The earlier decision was under the Code of 1872 and in this case also there was some de-

fective record of the confession. But there the learned Judges did not accept the view taken by the Full Bench in *Bai Ratan's* case (1). I do not see any reason why now we should be asked to ignore the view taken by this Court and to accept the view taken in the Punjab cases as a correct interpretation of S. 122. It is quite possible that S. 533 represents a compromise by the legislature between the two conflicting views. In the Code of 1882 the provisions of Ss. 122 and 346 were reproduced with some modifications which do not affect the present point. The change effected by S. 533 does not touch this case. All that I feel concerned to point out is that a confession under S. 164 of the Codes of 1882 and 1898 require no less to be in writing than one under the Code of 1872.

It is significant that the learned Government Pleader has not been able to cite a single instance in which a confession that could have been, but was not in fact, recorded under S. 164, was allowed to be proved by the oral evidence of the Magistrate to whom it might have been made. The case of *Emperor v. Gulabu* (7) is against the contention urged on behalf of the Crown. I do not think that the fact that the Magistrate was conducting an inquiry in that case is sufficient to differentiate it from the present case. Here the accused was produced before the Magistrate for a remand apparently under S. 167, Criminal P. C., and the provisions of S. 364 apply through S. 164. The ratio decidendi of that case would apply to the present case.

It is argued that it is anomalous that an oral confession made to any third person should be provable whereas such a confession made to a Magistrate should not be capable of proof. It is also urged that at any rate the evidence of the Magistrate in his private capacity should be held to be admissible. This argument ignores the distinction which the legislature has recognized between a confession made when the accused is free (not in Police custody) and that made to a Magistrate in the course of an investigation under Ch. 14. For reasons which it is not difficult to conjecture, the legislature has provided a special rule as to the recording of confessions made in the course of an investigation under Ch. 14 before the inquiry

(7) [1918] 85 All. 260=19 I. C. 807.

(1) [1878] 10 B. H. O. R. 166.

(2) [1874] 11 B. H. O. R. 44.

(3) [1875] 1 Bom. 219.

(4) [1881-82] 6 Bom. 283.

(5) [1881] 21 P. R. 1881 Cr.

(6) [1887] 52 P. R. 1867 Cr.

or the trial has commenced. And that rule must be given effect to. Besides, the accused appeared before the witness as a Magistrate and the accused was questioned by the Magistrate in his official capacity and not as a private individual. I do not think it proper to draw a distinction which is not based on facts and which has the effect of defeating the provisions of law. It seems to me that the contention on behalf of the Crown is directly opposed to the policy of S. 164 and of the Criminal Circulars issued from time to time by this Court as to the recording of confessions.

Even if the oral evidence were admissible I do not see how it would be prudent to rely upon it, when such strict safeguards as are indicated by S. 164, Criminal P. C., and the Criminal Circular No. 17 are considered desirable to ensure that the confession is voluntary and that it accurately represents what the accused has said. The oral evidence necessarily given after many days would lack that degree of assurance which the written record is expected and required to give. Anyhow as I feel clear that the confession said to have been made before the Magistrate of Patan cannot be proved, I need not consider any further the value of that confession.

The next thing relied upon by the Government Pleader is the evidence of the witnesses, Exs. 21—25. This is really the most important evidence against the accused; and I have given very anxious consideration to all that has been urged in favour thereof on behalf of the Crown. It is urged, not without force, that there is nothing to show why these five witnesses should falsely implicate accused 1. At the same time there are certain general considerations which cannot be ignored and which tell in favour of the accused. In the first place, there is the broad consideration that a Court of appeal has not the advantage of seeing the witnesses which the trial Court has, and when that Court has not been able to trust certain witnesses, the Court of appeal should be slow to differ from that Court in its appreciation of that evidence. With regard to two out of these five witnesses the learned Judge has made definite remarks. One of them (Ex. 21) is said to have given his evidence in a reckless manner and the other (Ex. 24) did not favourably impress the

learned Judge. Generally speaking, these witnesses failed to inspire the confidence of the trial Court and we have to give due weight to that fact. Secondly, all these witnesses knew about this murder, if their evidence is true, on 23rd November. They said nothing about it until 30th December. The police investigation commenced on 20th December and even then for ten days they did not break their silence. It must have been known in the village that the investigation was going on, and if any of the real culprits were minded to concoct a story to save themselves, they had ample time and opportunity to do so.

This circumstance derives some support from the fact that accused 2 adopted the unusual and rather suspicious course of going to Karad and surrendering himself to the police there, who had nothing to do with the investigation on 31st December, and of making a confession before the Magistrate at Karad on the 2nd. Accused 2 is a relation of Babaji and Laxman, who are witnesses in the case. Thirdly, we have the fact that though these witnesses except Dhondi speak of the presence of accused 2, their evidence on that point has not been relied upon, and that view of their evidence has been accepted or at least acquiesced in by the Crown, as there is no appeal against his acquittal on the charge of the abetment of murder. Fourthly, we have the fact that three out of these five witnesses, viz., Aba Laxman and Dhondi, admittedly took part in the removal of the dead body, and it is obvious that they are interested in saving themselves from the suspicion which would otherwise attach to them as regards this murder. Lastly, there is nothing to show as to how these persons came to be known to the police for the first time as witnesses who knew of the murder but were not concerned with it. They came rather suddenly on the scene on 30th and 31st December, and all of them except Dhondi said that accused 1 had murdered the deceased in the presence of accused 2. These are, in my opinion, weighty considerations, and while apparently there is a bulk of evidence in favour of the prosecution, its quality is open to question.

Now it is important to remember that the motive, such as it is, equally affects accused 1 and 2. It seems to me that

the evidence in the case points rather to the general unpopularity of the deceased in the village of Kolekarwadi and not to any particular enmity with accused 1. It appears from the evidence of the witness Dnyanu (Ex. 18) that the deceased had conveyed a takid through him to the villagers to assist him in removing weeds from the forest plantation, and on the day of the murder he had asked the witness to inform one Govinda Taral of Kolekarwadi that he was going to Kolekarwadi that very day and that the villagers were wanted for removing the weeds. The witness had conveyed the intimation. Thus it was probably known that he was going to the village that day, and the prospect of his presence for further work must have quickened the feelings against him in connexion with the impounding of cattle. I do not see any particular force in the suggestion that the motive for the crime was probably the circumstances that the accused 1 and 2 had a special grievance against him in respect of the compensation which they along with two others had to pay to the Forest Department.

But however that may be, I do not see how accused 1 can be particularly singled out as having a special motive to commit this crime as distinguished from the witnesses or accused 2. The murder was committed in the field of the witness Laxman (Ex. 23), whom the Judge suspects as being probably concerned in the murder. Such property as is identified is produced by the witness Laxman and accused 2. Laxman produced the umbrella with the broken end belonging to the deceased and accused 2 produced the axe and the penknife which belonged to the deceased. The explanation which the three witnesses who helped in the removal of the dead body have given as to how they came to be called by accused 1 to help him is entirely unsatisfactory. There is nothing on the record beyond the fact that he is the son-in-law of the patil to show that accused 1 is a man with any particular influence in the village. Under these circumstances the evidence of these witnesses must be viewed with great caution and suspicion, when they say that accused 1 alone murdered the deceased. It is needless to discuss this evidence in detail. I do not attach any importance to minor discrepancies in their evidence.

I have considered this evidence with care, and I am not satisfied that they state the truth when they attribute the whole responsibility for the actual murder to accused 1; no doubt the assessors have believed them as to accused 1; but they find on that evidence that accused 2 is not guilty. I am unable to accept that appreciation as either consistent or satisfactory.

The learned Judge was not prepared to rely upon this evidence and I cannot say that he was wrong in withholding his confidence from this evidence as regards accused 1.

I have no doubt in this case that the deceased was murdered on his way to Kolekarwadi by the villagers; and it is possible that accused 1 may have been the murderer or one of the murderers. I have considered the theory that accused 1 is at least one of the murderers. But on the evidence which is led to show that he was the murderer, it is difficult to accept that theory. On this evidence it is as likely as not that he was concerned only in the removal of the dead body like some of the witnesses and not with the murder. I do not think that the evidence is sufficient to establish his guilt on the charge of murder.

The circumstances that he pointed out the scene of offence where the broken end of an umbrella, probably the umbrella of the deceased, was found at some distance does not carry the case against him any further. It shows his knowledge of the place of the murder; but there are several witnesses who have that knowledge and if they can possess that knowledge without being guilty of murder, I do not see any reason why in the case of accused 1 any further inference should be drawn. This knowledge is consistent with his innocence on the charge of murder.

Lastly, the confession of the co-accused made before the Magistrate at Karad is relied upon as showing the guilt of accused 1. Apart from the obvious infirmity of such a confession when it is retracted before the committing Magistrate and at the trial, as in this case I do not see how this confession can be any better evidence than the evidence of the witnesses which I have already dealt with. It would be rather anomalous that a confession made by a person which is not good enough to establish his own

guilt, should be relied upon to establish the guilt of a co-accused. Even treating him as a witness, which he is not, I would not trust him as regards accused 1, having regard to his subsequent retraction and his suspicious conduct in going to Karad, and in making the confession there. I have dealt with these items of evidence separately. But taking them all together I am not satisfied that accused 1 is shown to be guilty of murder.

I would therefore dismiss the appeal. The bail bonds to be cancelled. It is to be regretted that the brutal murder of the forest officer remains unpunished. It may be possible however to initiate proceedings, if they have not been already initiated, against the persons concerned in the removal of the dead body under S. 201, I. P. C.

Hayward, J.—The accused Maruti Santu has been acquitted of the charge of the murder, on 23rd November 1917, of the forest beat guard Aba Gudhan in Kolekarwadi, a forest village in the Taluka of Patan. The two assessors were of opinion that the accused was guilty but a different view was taken by the Additional Sessions Judge of Satara. Hence this appeal by the Government of Bombay.

The accused Maruti had suffered together with other villagers for grazing cattle without permission in the forest of Kolekarwadi which was in the beat of Aba Gudhan, and no love was lost between the villagers and the forest guards as explained by witness 6, the forest round guard Laxman Dhondi, and witness 2, the Range Forest Officer, Mr. Lobo. On 23rd November 1917 Aba Gudhan sent word through witnesses 8 and 9, Dnyanu and Govinda Mahars, that he wanted the villagers to help in weeding the forest plantation and the same day set out for Kolekarwadi. He carried his axe of office and his umbrella and was helped by witness 10, Daji Mahar, on his way to Kolekarwadi. It is alleged that the accused Maruti Santu and another Maruti named Maruti Raoji met Aba Gudhan that same afternoon and that Maruti Santu struck him on the head with an axe, while Maruti Raoji was struggling with him. This was seen from ninety yards off by witness 12, Aba Santu, and from a greater distance by witness 11, Babaji Baloo. The two

Marutis were also seen standing beside the prostrate man by the other men who were attracted by their cries, namely, witnesses 13 and 14, Laxman and Daulata. This occurred in the Nagli fields in the hills of the village of Kolekarwadi. It is further alleged that the two Marutis that same night forced witnesses Aba Santu and Laxman and witness 15, Dhondi, to help them take the dead body seven miles off into the forest of the village of Karale. It was there found on 3rd December 1917 and showed three axe wounds on the head upon examination by the Sub-Assistant Surgeon. The two Marutis were implicated by an informer on 30th December 1917. Maruti Santu pointed out the scene of the murder, on 31st December 1917, where blood was found and the broken end of the umbrella of Aba Gudhan. He was arrested and admitted his guilt, but the admission was not recorded in writing on 1st January 1918 by the Second Class Magistrate of Patan. The rest of the umbrella was produced the same day by the witness Laxman and a two-anna piece removed from the dead body was also produced by the witness Dhondi. Maruti Raoji subsequently produced the penknife and axe of Aba Gudhan. He had admitted his guilt after surrender and the admission had been recorded in writing on 2nd January 1918 by the First Class Magistrate of Karad. The assessors were both satisfied on this evidence of the guilt of Maruti Santu but not of the guilt of Maruti Raoji. They were divided as to the guilt of Maruti Raoji of the minor offence of getting rid of evidence of the murder. The Additional Sessions Judge disagreed with them as to the guilt of Maruti Santu and agreed with one of them as to the guilt of Maruti Raoji of the minor offence of getting rid of evidence of the murder. This appeal relates to the acquittal of Maruti Santu of the murder. No appeal as regards Maruti Raoji has been made by the Government of Bombay.

It is clear on these facts that the decision depends mainly on the weight to be given to the evidence of the witnesses Aba, Babaji, Laxman, and Daulata. Aba was certainly a direct witness and some of the criticisms in the judgment would hardly appear justified on the record, but at the same time he was himself implicated in the removal of the dead body and

has given an improbable explanation of his help in that matter. Babaji was no doubt an unsatisfactory witness. He denied any direct knowledge of the matter until cross examined as to what he had stated to the committing Magistrate. Laxman and Daulata were again not entirely satisfactory. They both gave rather improbable explanations of their help being sought for the removal of the dead body, and it was Laxman who produced the umbrella while the witness Dhondu who also assisted in the removal of the body, produced the two-anna piece said to have belonged to the deceased. It ought not moreover to be forgotten that these witnesses did not relate their version of the matter till more than a month after the murder. The assessors believed these witnesses and their statements have indeed left the impression on my own mind of substantial truth, but they no doubt laboured under the infirmities indicated and it would not be possible therefore profitably to press this view against those held both by the Additional Sessions Judge and my learned brother.

The confessions do not materially modify the position. The confession of Maruti Santu was oral and not entitled to great weight, in view of the fact that it was not thought worth while to take the usual steps to have it formally recorded in writing.

It was however *prima facie* relevant under Ss. 21 and 24 to 26, though it had to be proved by oral testimony and not by the production of any writing duly recorded by any Magistrate under S. 80, Evidence Act. The confession of Maruti Raoji, on the other hand, though recorded in writing, was not one 'affecting himself' as regards the murder. It really exonerated himself from the murder.

It was therefore not relevant against any other person tried jointly for the murder under S. 30, though it had been duly proved by the production of the writing recorded by the First Class Magistrate under S. 80, Evidence Act. It is not strictly necessary in this view to discuss whether the oral statement was not irrelevant as matter required by law to be reduced to writing within the meaning of S. 91, Evidence Act by reason of the provisions of S. 164 and 533, Criminal P. C. It seems desirable however to point out that oral statements during

investigations have nowhere expressly been required to be reduced to writing.

It was therefore held in *Reg. v. Uttamchand Kapurchand* (8) that oral statements were not rendered irrelevant under S. 91, Evidence Act, by reasons of the reference to the writing in S. 162, Criminal P. C., though it was assumed on the other hand in *Reg. v. Bai Ratan* (1) that oral statements were rendered irrelevant under S. 91, Evidence Act, by the permission to record them in writing given to Magistrates under S. 164, Criminal P. C. The assumption, though subsequently repeated, requires scrutiny, as the word used was "may" record and not "shall" as in the provision relating to record of evidence on inquiries and trials and "may" could never mean "shall" so long as the English language should retain its meaning as declared in *Baker, In re. Nichols v. Baker* (9), by Cotton, L. J. If the statements should be recorded in writing under the permissive power then no doubt they "shall" be recorded in a particular manner and "shall" have a memorandum at the foot as to the manner in which they were recorded and no doubt the manner in which they were recorded would be matter required by law to be in writing and no other proof of that matter would have been relevant but for the exclusion of S. 91, Evidence Act, by S. 533, Criminal P. C. But if the statements should not be recorded in writing under the permissive power, then they would be unaffected either expressly or impliedly by reference to the provisions of S. 91, Evidence Act, in provisions relating to proof of the recorded writings under S. 533, Criminal P. C. If moreover it was intended to make oral statements, which would be relevant when made to private persons, irrelevant when made to Magistrates, then there would surely have been express provision that such statements should not be proved except by writings duly recorded by Magistrates. It would not have been left to mere implication from the provisions relating to the manner of proof of such writings when recorded by Magistrates under S. 533, Criminal P. C. This was no doubt urged without success in *Emperor v. Gulabu* (7) before a Bench of the Allahabad High Court. But it should, in my

(8) [1874] 11 B. H. O. R. 120.

(9) [1890] 44 Ch. D. 262=59 L. J. Ch. 661=62 L. T. 817=38 W. R. 417.

opinion be given further reflection with due deference to those learned Judges, should the matter hereafter be brought up in this Court.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 330

MACLEOD, C. J. AND HEATON, J.

Revansiddappa Panchappa Umbarje—
Plaintiff—Appellant.

v.

Secy. of State— Defendant — Respondent.

Second Appeal No. 1096 of 1917, Decided on 5th September 1919, from decision of Dist. Judge, Sholapur, in Appeal No. 42 of 1915.

Income-Tax Act (2 of 1886), S. 14 — Fresh assessment in same year is competent.

Under S. 14, the Collector has power, after the first assessment, to make a fresh assessment in the same year, if the circumstances of the case require it. [P 330 C 2]

*P. B. Shingne—*for Appellant.

*S. S. Patkar—*for Respondent.

Macleod, C. J. — The facts in this case are not disputed. The plaintiff was assessed for income-tax in the year ending 31st March 1913 in the amount of Rs. 833-5-4. The plaintiff paid that amount on 18th June 1912. It is admitted that the income of the plaintiff on which the assessment was levied was less than the actual income on which assessment ought to have been levied. When that had been ascertained, a supplementary bill was sent to the plaintiff for the amount of Rs. 488-10-8 on 7th November 1912, and a direction was made that the plaintiff should pay the amount of the bill by 4th January 1913. The plaintiff paid in the amount on 8th January 1913 under protest. Later on the plaintiff received a notice demanding payment of Rs. 61-1-4, as fine on account of the default in the payment of the income-tax money by the time fixed. The plaintiff paid the fine. He then filed this suit to recover from the Secretary of State for India the said amounts of Rs. 488-10-8 and Rs. 61-1-4 on the ground that the said amounts had been illegally levied, together with an amount of Rs. 38-1-6 as interest.

The plaintiff's suit has been dismissed in both Courts. In second appeal the same argument has been adduced before us which did not find favour in the lower Courts namely that the powers of the Collector of Income-Tax had become ex-

hausted when once he had made an assessment, and that any further assessment for the same year was illegal. S. 14, Income-Tax Act, 2 of 1886, provides that:

"The Collector shall, from time to time, determine what persons are chargeable under Part 4 and the amount at which every person so chargeable shall be assessed."

We do not think that that section means that when the Collector has once in any particular year determined that a certain person is chargeable under Part 4 and has determined the amount at which that person so chargeable should be assessed, his powers against that person for that year are exhausted, in the event of his discovering that the income of that person is somewhat greater than the income upon which the tax was first assessed. The words "from time to time" appear to me to make it perfectly clear that the Collector has the power after the first assessment to make a fresh assessment if the circumstances of the case require it. Even if we had any doubt in our minds as to the meaning of the words of S. 14, we have S. 50 which provides that

"all powers conferred by or conferrable under, this Act may be exercised from time to time as occasion requires."

That decides the question before us without any doubt. In my opinion the appeal fails and must be dismissed with costs.

Heaton, J. — I cannot conceive that when the Legislature passed the Income-Tax Act, they intended to express what the appellant says they have expressed. What he says is meant by the Act is that when the Income-Tax Collector has once made an assessment, he cannot increase or alter it (at a later date), although it may be perfectly clear that the original assessment was made on an under-estimate of the income-tax payer's income. If that were so, it would certainly revolutionize my conception of the powers of the Income-Tax Collector. Not only can I not conceive that the legislature intended to enact such a thing as that, but I think the words of Ss. 14 and 50 of the Act clearly show that the legislature expressed the opposite intention. I agree therefore that the appeal should be dismissed with costs.

G.P./R.K.

Decree confirmed.

A. I. R. 1920 Bombay 331

SHAH AND HAYWARD, JJ.

Cholappa Gattinna Sanna and another
—Appellants.

v.

Ramchandra Anna Pai—Respondent.

Second Appeal No. 1014 of 1916, Decided on 16th June 1919, from decision of Dist. Judge, Kanara, in Appeal No. 122 of 1915.

Civil P. C. (5 of 1908), S. 145—Decree can be executed against surety as ordinary execution—Appeal by defendant—Surety not party to appeal—Liability of surety is not affected.

A decree-holder has, under S. 145, a right to execute his decree against a surety to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees. The fact that the defendant appealed and that the sureties were not parties to the appeal, would make no difference. [P 331 C 2]

Coyajee and A. G. Desai — for Appellants.*Nilkanth Atmaram*—for Respondent.

Shah, J.—In this case an ex parte decree was originally passed against defendant 1 in Suit No. 342 of 1901; but that ex parte decree was set aside and the suit was ordered to be retried on defendant 1 furnishing security. Two persons, who are now represented by the present appellants, stood sureties for the amount that the Court, in which the suit was filed, i. e., the Sirsi Court, might find the defendant liable for. Ultimately a decree was passed by the Sirsi Court against defendant 1 on 22nd March 1907 for a certain amount. The defendant appealed to the District Court, which subject to some variation, with which we are not now concerned, confirmed the decree of the trial Court on 15th April 1903. In second appeal this Court confirmed the decree of the District Court on 13th February 1911. The decree-holder applied for a transfer of the decree for execution against the sureties on 20th December 1913. The sureties contended that the execution as against them was time barred, as no application for execution was made within three years from the date of the trial Court's decree which alone they had undertaken to satisfy. The first Court allowed this contention; but in appeal the District Court has disallowed it and has ordered the Court of first instance to proceed with the application against the sureties according to law.

In the appeal before us the same contention has been raised on behalf of the sureties: I am of opinion that the view

taken by the District Court is right. It is clear from S. 145, Civil P. C., that the decree-holder has a right to execute the decree against a surety to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees. The article which governs the applications for execution is Art. 182, Sch. 1, Lim. Act. The article prescribes three years' limitation from the date of the decree or where there has been an appeal, from the date of the final decree of the appellate Court. The execution of the decree is clearly not time-barred, if the period of limitation begins to run from the final decree of the High Court in second appeal. Under this article the decree-holder has clearly a right to proceed against the sureties within the time allowed under Cl. 2 in the third column.

It is contended, however that the sureties undertook to satisfy the decree of the Sirsi Court, that they have nothing to do with the appeal preferred by the defendant, to which they were not parties, and that the application is governed by Cl. 1 and not Cl. 2. I do not think that this contention is sound. For instance, if the defendant's appeal had succeeded, the sureties would have taken the benefit of the appellate Court's decree in favour of the defendant. It cannot be said that when they stood sureties for the defendant in the trial Court, they could not have contemplated the possibility of an appeal, which would be an ordinary incident of the litigation which was re-opened with their assistance at the instance of defendant 1 and which would have the effect of extending the time from which the limitation would begin to run according to the Limitation Act. The fact that the sureties would not be parties to the appeal could not make any difference.

Mr. Coyaji has relied upon the decision in *Narayan v. Timmaya* (1); but that decision is based upon the consideration of the explanation applicable to Cl. 5 in the third column. It has nothing to do with the point arising in this case. I do not think that that case lends any support to the contention that in determining the date from which the prescribed period of limitation under Art. 182 should run in the present case, Cl. 1 only should be considered and that Cl. 2 can have no application, as the sureties were not par-

(1) [1907] 81 Bom. 50=8 Bom. L. R. 807.

ties to the appellate Court's decree. I would dismiss the appeal and confirm the decree of the lower appellate Court with costs.

Hayward, J.—I concur. The applicants became sureties for the execution against defendants of the decree of the original Court. Their liability would be enforceable to the extent to which they have rendered themselves personally liable in the manner provided for the execution of decrees under S. 145, Civil P. C. They were therefore liable to be proceeded against within the ordinary period prescribed by limitation for the execution of such decrees. That period has been prescribed by Art. 182, Sch. 1, Lim. Act. They have claimed to be governed by Cl. 1 of that Article, and they have contended that execution has become time-barred against them as more than three years have elapsed since the date of the decree of the original Court. They have contended that Cl. 2 applies only to parties who have appealed, and that it is only in the case of parties who have appealed that execution can be brought within three years of the date of the final decree of the appellate Court. It seems to me that their contention is unsound and contrary to the plain and wide words of the clause, and that view was held in the similar case of defendants who had not appealed in *Shivram v. Sakharam* (2). It seems to me, therefore that the execution was not time-barred and that the appellants were liable to be proceeded against in execution under Cl. 2, Art. 182, Sch. 1, Lim. Act. I am of opinion, therefore that the appeal must be dismissed with costs.

G.P./R.K. *Appeal dismissed.*

(2) [1909] 33 Bom. 39=10 Bom. L. R 939.

A. I. R. 1920 Bombay 332

MACLEOD, C. J. AND SHAH, J.

Ganapati Nagappa—Plaintiff—Appellant.

v.

Nagabhatta Shitarambhatta and others—Defendants—Respondents.

Second Appeal No. 1079 of 1917, Decided on 13th August 1919, from decision of Dist. Judge, Kanara, in Appeal No. 197 of 1917.

Landlord and Tenant — Mulgeni lease — Landlord can recover rent due from transferee of permanent lease by mulgeni tenant.

The transfer by a mulgeni tenant of his permanent lease has the effect of creating privity

of estate between the landlord and the transferee, and the former is entitled to recover from the latter the rent due under the lease.

[P 332 C 2]

G. P. Murdeshwar—for Appellant.

V. R. Sirur—for Respondents.

Macleod, C. J.—The plaintiff sued in this case to recover Rs. 129-15-0 as three years' rent from the defendants, who he alleged were his mulgeni tenants. The suit has been dismissed in the trial Court and an appeal against that order has been dismissed by the lower appellate Court. It is admitted that the plaintiff is the landlord of the lands in question, but the defendants dispute the claim on the ground that there is no privity of estate between themselves and the plaintiff because they claim to be sub-tenants from the original mulgeni tenants. It has been admitted in argument that a mulgeni tenant, who is a permanent tenant, can transfer the whole of his interest, and if he does so, then privity of estate arises between the landlord and the transferee. It is perfectly immaterial whether you call the document of transfer a sublease or an assignment or a transfer. We have only to consider what is the actual effect of the document and if it leaves no interest remaining in the transferor, then it must follow that the transferee gets the whole of the transferor's interest. In that case the transferee becomes the permanent tenant, and there is privity between him and the landlord. I asked the respondents' pleader whether the document in the defendant's favour left any interest remaining with the previous tenant and he was not able to show us that there was any interest left. I asked whether under that document the defendants had paid any rent to their transferors, but that question could not be answered in the affirmative. The result is that the defendants have been holding as mulgeni tenants, and disputing the right of the landlord to get rent from them, on the allegation that their transferor as the original mulgeni tenant is the person who is liable to pay rent. It seems to me that that contention on the part of the defendants is absolutely wrong and that the plaintiff was entitled to recover. We allow the appeal. There will be a decree for the amount claimed with costs throughout. The lower Court will find what is a reasonable rent to allow for the three

years in suit and certify its finding to this Court within one month.

Shah, J.—I agree. I desire to add that even though the permanent tenancy in favour of defendants 1 and 2 may be in form a sublease by the original mulgenidar, still the lease in favour of the present defendants is a permanent lease, i. e., for the whole term for which the original mulgenidar held the lands. It is clear that in substance it is an assignment by the original mulgenidar of a permanent lease in favour of defendants 1 and 2, and that consequently there is a privity of estate between the plaintiff and the defendants.

It is not and cannot be disputed that a sublease of a tenancy for a definite period for the whole of that period operates as an assignment thereof. I do not see any reason why the same rule should not apply to a permanent tenancy. On this point I am unable to agree with the view taken by the learned District Judge.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 333 (1)

SCOTT, C. J. AND BEAMAN, J.

Hathising Jeebhai Baria and others—
Defendants—Appellants.

v.

*Kuber Jetha Patel and others—*Plaintiffs—Respondents.

Appeal No. 54 of 1916, Decided on 11th July 1917, from order of Joint Judge, Ahmedabad, in Appeal No. 313 of 1914. Bombay Land Revenue Code (5 of 1879), S. 135—Presumption under S. 135 (J) does not apply to entries made before 1913.

The provisions of S. 135(J), which was enacted by Act 4 of 1913, are not retrospective, and the presumption contained in that section does not therefore apply to entries made before 1913.

[P 333 C 2]

G. N. Thakor—for Appellants.

M. H. Mehta—for Respondents.

Judgment.—It appears from the judgment of the learned Joint Judge that he has presumed certain entries in the Record of Rights to be true. Those entries were made originally in 1905-06, and were repeated in 1912-13. The revenue years end on 31st March. Therefore the latter entry in the Record of Rights must be taken to have been made prior to 31st March 1913. Bombay Act 4 of 1913, which amended the Land Revenue Code and superseded the original Record of Rights Act, 1903, enacted

that a new S. 135-J should be added to the Land Revenue Code, providing that "an entry in the Record of Rights and a certified entry in the register of mutations shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor."

That Amending Act did not receive the assent of the Governor-General in Council until 23th May 1913, which would be in the revenue year 1913-14, subsequent to the year in which the last entry relied upon by the learned Judge was made. We do not think that the provisions of S. 135-J, which have just been read, can be retrospective with regard to entries which for the purpose of determining the rights of the parties were until after the year 1913 innocuous. The appellants' pleader has therefore successfully shown that the decree of the learned Judge has been influenced materially by evidence or by a presumption which he ought not to have made. For these reasons we must remand the case to the learned Judge, directing him not to give effect to the presumption in S. 135-J with regard to entries made prior to the operation of the Amending Act of 1913. If the entries in the Record of Rights are still relied upon as of any probative value, the defendants should be allowed to give rebutting evidence with regard to the facts recorded therein, as the entries themselves appear to have been admitted at a very late stage. The learned Judge should consider the evidence already recorded, and such further evidence as may be given, in the light of the remarks in this judgment. We set aside the decree and remand the case for disposal to the lower Court. Costs in the cause.

G.P./R.K.

Case remanded.

A. I. R. 1920 Bombay 333 (2)

MACLEOD, C. J. AND HEATON, J.

*Amarappa Sanabasappa Gumalpur—*Plaintiff—Appellant.

v.

Rachava Sugappa—Defendant—Respondent.

Second Appeal No. 684 of 1917, Decided on 5th September 1919, from decision of Dist. Judge, Bijapur, in Appeal No. 165 of 1915.

Transfer of Property Act (4 of 1882), S. 123—What is attestation stated.

Under S. 128 a deed of gift requires attestation by two witnesses, and attestations in this

connexion means the witnessing of the actual execution of the document by the person purporting to execute it. [P 334 C 1]

S. R. Parulekar for *A. G. Desai*—for Appellant.

H. B. Gumaste—for Respondent.

Judgment.—The plaintiff in this case relies upon a deed of gift. He was unable to prove in the trial Court that it was attested according to law. The deed would require to be attested by two witnesses under S. 123, T. P. Act. In *Shamu Patter v. Abdul Kadir Rowthan* (1) it was held by their Lordships of the Privy Council that the word "attested", in S. 59, T. P. Act, meant the witnessing of the actual execution of the document by the person purporting to execute it. It is quite clear that that decision also covers S. 123, T. P. Act, so the appeal must be dismissed, unless we agree to allow it to stand over as suggested by the appellant's pleader on the chance of Act 26 of 1917, being extended to this Presidency. We do not think the mere chance that that Act may be extended is any ground for allowing the appeal to stand over. It is true that we are told that a representation has been made to Government to extend the Act to this Presidency, but it is impossible to say whether that application will result in the Act being extended. No doubt if the Act is extended, then provision may be made that suits which have been dismissed on the ground that a document has not been properly attested according to the decision in *Shamu Patter's* case (1) may be restored. The appeal is dismissed with costs.

G.P./R.K. * *Appeal dismissed.*

(1) [1912] 35 Mad. 607=16 I. C. 250=39 I. A. 218 (P. C.).

A. I. R. 1920 Bombay 334

PRATT, J.

Kering Rupchand & Co.—Plaintiffs.

v.

A. S. B. Bayley—Defendant.

Original Suit No. 1591 of 1919, Decided on 22nd July 1919.

Usurious Loans Act (10 of 1918), S. 3 (1)—S. 3 (1) can be applied even in absence of defendant—Provisions in bond for payment of excessive interest—Court can give relief.

In a suit to recover on a bond in which the defendant does not appear, the Court has jurisdiction, under S. 3 (1) to consider the merits of the transaction.

Where in such a suit the Court finds that the provision as to payment of interest is substantially unfair, the case is a fit one in which the

transaction between the parties may be reopened, and relief given in respect of excessive interest

Where interest on the whole sum borrowed continues at the rate fixed, though the principal is being progressively discharged by instalments, the provision as to interest is altogether unconscionable and unfair and will not be enforced. [P 334 C 2 ; P 335 C 1]

D. A. Ghasvalla—for Plaintiffs.

Judgment.—In this suit, the plaintiff, a Poona money lender, seeks to recover on a bond executed by the defendant on 7th September 1918. The consideration of the bond is a cash advance of Rupees 5,000, and the obligor agrees to re-pay Rs. 8,400, i. e., Rs. 5,000 principal and Rs. 3,400 interest. The interest is assessed at 2 per cent per mensem, i. e., Rs. 100 a month for Rs. 5,000 ; and it is calculated in advance for thirty-four months. The total amount of Rs. 8,400 is then re-payable in thirty-three instalments of Rs. 250 and one 34th instalment of Rs. 150. Thus the principal is re-paid in thirty-three instalments of Rs. 150 and one instalment of Rs. 50 and the interest is re-paid in thirty-four instalments of Rs. 100.

The first three instalments have been recovered by a suit in the Court of Small Causes. The present suit is for six instalments from January to June 1919.

The defendant does not appear but though the suit is *ex parte*, the Court has, under S. 3 (1), Usurious Loans Act 1918, jurisdiction to consider the merits of the transaction.

The bond professes to charge interest at 2 per cent per mensem, but the scheme of the bond is that the interest on the whole sum of Rs. 5,000 should continue to be paid at this rate though the principal is being progressively discharged by instalments. The obligor of the bond therefore continues to pay interest on money which he has actually re-paid. This provision seems to me altogether unconscionable and unfair. Moreover the effect of it is that though at the end of the first month the interest paid, is at the rate of 2 per cent per mensem yet this rate progressively increases until at the end of the 33rd month Rs. 100 interest is paid for a balance of Rs. 200, or at the end of the 34th month Rs. 100 interest is paid for a balance of Rs. 50. The rates of interest at the end of the 33rd and 34th months work out to the preposterous rates of 50 per cent per mensem and Rs. 200 per cent per mensem.

Under the Act, the Court may re-open the transaction and relieve the debtor of all liability in respect of excessive interest if two conditions are fulfilled. These are that the Court has reason to believe (a) that the interest is excessive, and (b) that the transaction was as between the parties thereto substantially unfair.

On the first point, there can, of course, be no doubt. As to the second, it may be said that the defendant is a member of the Indian Finance Department and that he must have understood the terms of the bond and that his agreement is evidence that the transaction was not unfair. But the Explanation to S. 3 enacts that interest may of itself be sufficient evidence that a transaction was substantially unfair. The Legislature has adopted the view of Lord Loreburn in *Samuel v. Newbold* (1) that excess of interest may in itself rebut any presumption of reasonableness arising from the agreement of the party. Moreover, I have already found that the transaction which involves payment of interest on money, in fact has been re-paid, is substantially unfair. I therefore think this is a fit case for re-opening the transaction between the parties and giving relief in respect of excessive interest.

I do not and cannot disturb the transaction so far as it has been concluded by the decree of the Small Causes Court in regard to the first three instalments. As regards the six instalments in suit there is no occasion to disturb the provision for repayment of the principal by instalments of Rs. 150 per mensem.

The loan was made on personal security and I may take it that the rate of 2 per cent per mensem was reasonable in view of the risk incurred. But the progressive increase of this rate and the provision which makes money chargeable with interest after it has been re-paid, is both excessive and substantially unfair. I therefore disallow interest on sums actually re-paid. This will not make much difference in the present suit, but will make a considerable reduction when the account comes to be taken of the future instalments. If the account were taken in this way, the interest chargeable on the six instalments in suit would not be Rs. 100 per mensem but would be reduced as follows :

Instalment. Principal unpaid. Interest at 2 p. c. p. m.		
January	4,550	91
February	4,400	88
March	4,250	85
April	4,100	82
May	3,950	79
June	3,800	76

501 instead of 600

But as no instalment of principal has been paid the plaintiff is entitled to 2 per cent per mensem on Rs. 4,550 due in January.

Decree therefore for the plaintiff for Rs. 900, interest at 2 per cent per mensem on Rs. 4,550 from 10th January 1919 till judgment. Costs and interest on judgment at 6 per cent.

G.P./R.K. *Decree accordingly.*

A. I. R. 1920 Bombay 335

MACLEOD, C. J. AND HEATON, J.

Bai Nathi—Plaintiff—Appellant.

v.

Narshi Dullabh and others—Defendants—Respondents.

First Appeal No. 527 of 1916, Decided on 27th August 1919, from decision of 1st Cl. Sub-Judge, Broach, in Suit No. 224 of 1914.

Civil P. C. (5 of 1908), S. 11—Decision on issue to operate as *res judicata* is necessary for disposal of suit—Adverse finding against person in whose favour decree is passed cannot operate as *res judicata*.

In order that a finding upon a particular issue should operate as *res judicata*, it is necessary not only that the issue should be heard and decided, but that it should be finally decided i. e., its decision should be necessary for the final disposal of the suit.

Where a decree is not based upon a finding and is in favour of the party against whom the finding is recorded, so that that party cannot appeal against the finding, the finding cannot be said to be final and would not operate as *res judicata*. [P 336 O 2]

Chimanlal Setalvad and *N. K. Mehta*—for Appellant.

Jayakar, C. N. Thakor and *B. D. Mehta*—for Respondents.

Macleod, C. J.—The plaintiff sued to recover possession of the properties described in Schs. C. E. F. attached to the plaint, and mesne profits, alleging that the plaint properties formed part of a Boag in Rahad in Waghra Taluka. The Plaintiff 1 claims as the daughter of Bahu, who is alleged to have become the owner of the Bhag as a survivor between himself and Desai Purshottam, his first cousin. Defendant 2 was the son of Bai Lal, the sister-in-law of the plaintiff's

(1) [1906] A. C. 461=75 L. J. Ch. 705=95 L.T. 209=32 T.L.R. 708.

mother. Defendant 1 claims title to the plaint property through Desai Manor, a distant relation of Bahu, and also in virtue of a transfer from Gadbad, defendant 2. Defendants 3 to 5 claim to be in possession through Bahu's cousin Desai Purshottam, and defendant 6 claims through Desai Manor.

The suit was dismissed by the learned Subordinate Judge on the ground that it had been decided in a former suit, in which plaintiff 1 and defendants 1, 3, 4 and 5 were parties, that females were excluded from inheritance to this particular Bhag. That suit was brought by the transferees of Desai Manor against the present plaintiffs and others, alleging that Desai Manor was the nearest male agnate and heir of Desai Purshotam and Bapu. The suit was dismissed on the ground that, whether females were excluded from the inheritance or not, Desai Manor was not proved to be the nearest Pitrai heir to Bapu. An issue was raised whether the custom of the daughter's exclusion by a Pitrai was proved to have been in existence in the Bhagdari village of Rahad. The Court held that it was proved in the case that in the Bhagdari village of Rahad the daughter was excluded from inheritance to her father's property. It must be noted that the suit was dismissed because plaintiffs claimed through Desai Manor, who was not proved to be the nearest Pitrai heir to Bahu, and therefore there was no necessity for a finding on the issue whether the daughter was excluded by a Pitrai in this particular Bhagdari village. It has been argued in support of the judgment of the Court below that this finding is *res judicata* within the meaning of S. 11, Civil P. C.

No doubt the issue was heard and the issue was decided, but it was not finally decided, because it was not necessary for the decision which the Court came to dismissing the suit, and Bai Nathi had no opportunity of appealing against the Court's finding on that issue. In fact there was no necessity for her, even if she could have appealed against it, because she got everything which she wanted in the suit which was filed against her. We have been referred to the case of *Niamut Khan v. Phadu Buldia* (1). But that case was referred to in *Thakur Magundeo v. Thakur Mahadeo*

Singh (2). The Judges there say that the Privy Council in a more recent case have expressed an opinion which is in opposition to the judgment of the Full Bench in *Niamut Khan v. Phadu Buldia* (1). The test they applied is this: has the issue been finally decided, and they say:

"We think that the finding of the Court in the previous suit was not final, inasmuch as the decree was not based upon it, and there could be no appeal against it, because the decree was in favour of the party against whom the finding was recorded;"

and that case was followed in *Parbatty Debya v. Mathura Nath Banerjee* (3). In my opinion that is a correct test to apply to the question before us. If when drawing up the decree it had been declared that females were excluded from inheritance in this Bhagdari village, then it might have been urged that the matter had been finally decided, on the ground that Bai Nathi might have appealed against that decision, and had not done so. But ordinarily where a suit is dismissed nothing is stated in the decree except "the suit is dismissed." Against that decree the defendant cannot appeal. In my opinion, therefore, the finding of the lower Court that this question was *res judicata* against Bai Nathi was wrong, and therefore the suit ought not to have been dismissed on that ground.

But it has been suggested that the suit is also liable to be dismissed as bad for misjoinder of parties and causes of action. That should never be a ground by itself for dismissing a suit. The party, against whom misjoinder is alleged, must always have an opportunity of remedying the defect, by striking out the parties who ought not to have been joined and amending the plaint, and also by making any necessary amendments so as to strike out any causes of action which ought not to have been joined. This is only a technical ground, which should never form the foundation for an order dismissing a suit, as the matter can always be put straight by directing the party who had made the original mistake to pay the costs of the opposite party incurred on account of the mistake having been made therefore, the order dismissing the suit must be set aside and the appeal allowed with costs. The case will then go back to the lower Court to

(2) [1891] 18 Cal. 647.

(3) [1913] 40 Cal. 29=15 I. C. 453.

(1) [1881] 6 Cal. 319=7 C. L. R. 227 (F. B.).

be tried on the merits under O. 41, R. 28 and the plaintiff must have an opportunity, if the Judge so directs, to amend her plaint.

Heaton, J.—I agree, and as to the point of *res judicata* I agree for the reasons given by me in my judgment in the case of *Daulbhai v. Daya Rama* (1).

G.P./R.K. *Appeal decreed.*

(1) [1919] 43 Bom. 558=51 I. C. 109.

A. I. R. 1920 Bombay 337

MACLEOD, C. J. AND HEATON, J.

Bilasirai Laxminarayan—Plaintiff—Appellant.

v.

Cursondas Damodardas—Defendant—Respondent.

Original Civil Appeal No. 13 of 1919, Decided on 21st July 1919.

(a) Civil P. C. (5 of 1908), O. 9, Rr. 8 and 9—Dismissal under R. 8 must be set aside under R. 9 on sufficient cause being shown—Court can however restore for any other reason in exercise of inherent powers by providing for defendant's costs.

Order 9, R. 9, makes it compulsory on a Court to set aside a dismissal under O. 9, R. 8 of the Code, where the plaintiff satisfies it that there was sufficient cause for his non-appearance. This rule however does not take away the Court's power to restore the case for any other valid reason. The Court can exercise its inherent jurisdiction for the ends of justice, provided the defendant is amply protected in the matter of costs. [P 337 C 2]

(b) Civil P. C. (5 of 1908), O. 9, R. 13—Decision by one Court about absence of sufficient cause for non-appearance is no precedent for another Court on same facts.

The decision of one Judge on the facts before him, that sufficient cause has not been shown for the restoration of a suit, cannot provide a precedent for other Judges on similar applications. [P 337 C 2]

(c) Precedent—On facts there can be no precedent.

On questions of fact or matters of discretion there can be no precedent. Each Judge is entitled to come to the conclusions he thinks right on questions of fact and in matters of discretion. [P 337 C 2]

Desai—for Appellant.

Bahadurji—for Respondent.

Macleod, C. J.—This suit was called on for hearing on 7th January 1919, when counsel, who had been instructed on behalf of the plaintiff, finding that his client was not in Court to give evidence, asked for an adjournment. The defendant appeared and opposed the application, which was refused, and thereafter the suit was dismissed under O. 9, R. 8. The plaintiff then asked for the restoration of the suit on the grounds mentioned

in his affidavit of 21st January 1919. In para. 1 he said :

"I say that I could not attend the Court in time, as I had been that morning to the firm of Messrs. Sadasuk Gambhirchand to bring with me to Court Mr. Revimal Kasturchand, the Moonim of the said firm, who is my principal witness in this suit. I had been to the said firm to fetch the Moonim at about 11 a.m. but was told that the Moonim was out and would soon return. As I was told that he would soon return I waited for him. The said Moonim returned about 12-30 noon and soon after he returned, I came with him to the Court but I found that the suit was called on and dismissed. As the suit was fourteenth on the Board List for that day, I did not expect it to be called on before 1 p.m."

The learned Judge did not think that the facts alleged in that affidavit provided sufficient cause under O. 9, R. 9, and he said he was bound by the precedent in the case of *Manilal Dhunji v. Gulam Hussein Vazeer* (1). But it is difficult to see how a decision of one Judge on the facts before him, that sufficient cause has not been shown for the restoration of a suit, can provide a precedent for other Judges on similar applications. On questions of fact or matters of discretion there can be no precedent. Each Judge is entitled to come to the conclusion he thinks right on questions of fact and in matters of discretion. Apart from that I agree with the remarks of the learned Judges in *Lalla Prasad v. Ram Karan* (2). Their Lordships say :

"On appeal, we are asked to hold that there was sufficient cause. While we think that it might be difficult to hold that there was sufficient cause in view of the fact that the case was actually called and repeatedly called for 20 minutes in the manner in which cases are called in Mofussil Courts both within the Court room and outside the Court room, so that persons in attendance in the Court compound were sure to hear, we are of opinion that the case is one of those in which the Court may exercise its inherent powers of passing orders necessary for the ends of justice. Nothing in the Code of Civil Procedure can limit or otherwise affect such powers under which, in our opinion, a Court can restore such a case as this on grounds other than sufficient cause for non-appearance. O. 9, R. 9, makes it compulsory on a Court to set aside a dismissal under O. 9, R. 8, where the plaintiff satisfies the Court that there was sufficient cause for non-appearance. It however cannot take away the Court's power to restore the case for any other valid reason."

I am of opinion that this is a case in which, whether there was sufficient cause or not, we should exercise the inherent jurisdiction of the Court for the ends of

(1) [1889] 13 Bom. 12.

(2) [1912] 34 All. 426=14 I. O. 187.

justice, provided the defendants are amply protected in the matter of costs.

The plaintiff must pay the costs of the adjournment and any costs caused to the defendants by his non-appearance, including the costs of his application of 23rd January 1919. Those must be paid before the suit can be restored. Then he must deposit Rs. 1,000 for the security of defendants' costs, and on those costs being paid and the security given the suit must be restored.

The costs of this appeal to be costs in the cause.

The security to be furnished within three weeks.

Heaton, J.—I concur.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 338

MACLEOD, C. J. AND HEATON, J.

Madhav Krishna Deshpande and another—Defendants—Appellants.

v.

Shiddaya Danappaya—Plaintiff—Respondent.

Second Appeal No. 918 of 1917, Decided on 4th September 1919, from decision of Dist. Judge, Bijapur, in Appeal No. 32 of 1916.

Hindu Law—Alienation—Widow—Necessity—Proof—Proof of reversioner's consent shifts burden from alienee to person challenging alienation—Excess land alleged to have been sold—Person challenging must prove that less could have been sold.

Where an alienation by a Hindu widow is challenged, as soon as the alienee, on whom first the onus lies to show that the alienation is for legal necessity, proves that the reversioner consented to the alienation, the onus is shifted on to the person challenging the alienation to show that there was no legal necessity.

[P 338 C 2]

In such a case if the plaintiff alleges that the widow has sold more than was necessary, it lies upon him to show that so much of the land as he alleges was required for legal necessity could have been sold, otherwise the Court is entitled to presume that the widow could not have sold less than what she did in order to realise the sum required for necessary purposes. [P 339 C 1]

Jayakar and H. B. Gumaste—for Appellants.

Settur and G. P. Murdeshwar—for Respondent.

Macleod, C. J.—On 3rd September 1901 Balawa, the widow of one Danapaya deceased, sold the plaint property to defendants 1 and 2 with the consent of her two daughters, the nearest and only reversioners at the time. In 1909 Balawa adopted the present plaintiff, and the

plaintiff has now brought this suit for a declaration that the sale deed of 1901 was not binding on him, and that he was entitled to recover possession of the plaint lands from defendants 1 and 2. It must be noted that Balawa is still alive. The plaintiff is a minor suing by his maternal uncle, and it looks very much like an attempt on the part of the widow to set aside an alienation made by her in 1901, because as a matter of fact the plaintiff would know nothing about what was being done in his name.

The trial Court directed that on the plaintiff paying to the defendants within three months from the date of the order the sum of Rs. 800 the sum spent for improvements by the defendants, the defendants should put the plaintiff in possession of the plaint lands.

On appeal, the lower appellate Court has amended the decree of the lower Court by directing that the plaintiff should pay Rs. 500 in addition to Rs. 800 as it had been proved that out of the price for the land which was realised in 1901, Rs. 500 were required by the widow for legal necessity. Now the alienation of 1901 was an alienation by the widow of part of the property left to her by her husband with the consent of the reversioners. Such consent was held, in *Rangasami Gounden v. Nachiappa Gounden* (1), to afford a presumptive proof, which would validate the transaction as a right and proper one if not rebutted by contrary proof: see the remarks of their Lordships at p. 84 of 46 *I. A.* As soon as, therefore the defendants, on whom first the onus lay to show that the alienation was for legal necessity, did prove that the reversioners had consented, the onus shifted to the plaintiff to show that there was no legal necessity. Neither of the lower Courts seems to have noticed that at a particular point of the trial the onus of proving legal necessity shifted. The legal necessity is set out in the sale deed: Rs. 400 were due to the defendants by Danapaya and Rs. 100 were due to one Irappa, and Rs. 400 were required for Balawa's maintenance owing to famine at the time. It is not disputed that the year 1901 was famine year in the District of Bijapur. Therefore the suggestion that Balawa ought to have maintained herself out of

(1) A. I. R. 1918 P. C. 196=42 Mad. 523=46
I. A. 72=50 I. C. 498 (P. C.).

the other 44 acres of her husband's property is hardly one to be relied upon by the plaintiff. But certainly the onus lay on the plaintiff to show that none of the Rs. 400 was required for legal necessity by the widow. She had to support herself and daughters and it would certainly appear that even if not the whole of Rs. 400, she would require some of it.

Then the question arises whether the widow oversold or, in other words, sold more than was necessary, in the circumstances at the time. There certainly may be cases where a widow may sell far more of the property than is required at the time for legal necessity. Now it is quite possible that in this case a portion of the Rs. 900 may not have been required actually by the widow for legal necessity, but it lay upon the plaintiff to show that so much of the land as was required, as the plaintiff says would suffice for the legal necessity, could have been sold, otherwise one is entitled to presume that the widow could not have sold less than she did in order to realize what was required at any rate to pay off her husband's debts, and to provide herself with maintenance until the famine was over. In *Bal Krishna Das v. Hira Lal* (2) the daughter of a separated Hindu sold a house, which had been the property of her father in his lifetime and had been previously mortgaged by herself and her mother jointly. The debt at the time of the sale amounted to Rupees 7,775, and the house was sold for Rupees 19,500. On the other hand, it was found that the house was not one which could have been divided and sold piecemeal. On these facts it was held that the reversioner to the last male owner was not entitled to recover the house from the vendees.

We are therefore of opinion that the plaintiff has not satisfied the onus which lay on him, and that therefore the judgments in the lower Courts cannot be supported. The suit must be dismissed with costs throughout, the decree of the appellate Court being reversed.

Heaton, J.—I agree. I only add a few words, because it might be supposed that we were in second appeal interfering with a decision arrived at on the evidence by the Court of first appeal. The evidence, or rather the facts found, as set out in the judgment of the Court of

first appeal, show that the sale, which the plaintiff now seeks to set aside, was a legal and proper sale. Because the facts found establish, first of all, that as regards Rs. 500 out of Rs. 900 of the consideration, there was undoubtedly necessity for the sale. They also establish that as regards the remaining Rs. 400, whether there was necessity or not is a matter of conjecture and speculation. But the facts found also show that the nearest reversioners specifically assented to the sale. We have therefore facts found which, so far as they go, must compel the conclusion that the sale as a whole was a proper and legal sale. Before a Court could be justified in holding the contrary, there would have to be other evidence, there would have to be other facts proved which would rebut the conclusion which I have just stated and would support something better than a merely conjectural or speculative inference. There are not in this case other facts of that nature proved. I think therefore that the decision of the lower appellate Court was a decision which was wrong in law. Therefore I think the appeal must be allowed.

G.P./R.K.

Decree reversed.

A. I. R. 1920 Bombay 339

SHAH AND CRUMP, JJ.

Alex Pimento and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 117 of 1920, Decided on 7th July 1920, from conviction and sentence passed by 1st Class Magistrate, Salsette.

(a) Penal Code (45 of 1860), S. 499—Imputation with reference to person intending to harm, but not actual harm is necessary.

In order to render the offence of defamation complete, there must be an imputation with reference to a person intending to harm, or knowing, or having reason to believe that such imputation will harm the reputation of the person against whom the imputation is made. Proof of actual harm to the reputation of the person defamed is not necessary. [P 840 C 1, 2]

(b) Criminal P. C. (5 of 1898), Ss. 540 and 537—Recording of prosecution evidence after defence evidence is serious irregularity.

The special powers conferred upon a Court by S. 540, may be exercised under proper circumstances, but the recording of evidence on behalf of the prosecution after the defence evidence is closed cannot be justified. It is an irregularity which ought to be avoided. [P 841 C 1]

G. N. Thakor—for Appellants.

S. S. Patkar—for Crown.

Shah, J.—Two points have been raised in support of this application: first that the offence of defamation of which the petitioners have been found guilty, is not complete as there is no proof in this case that the defamatory words actually caused harm to the reputation of the person with reference to whom they were used; and, secondly, that certain evidence on behalf of the prosecution was improperly admitted by the Trial Court after the defence evidence was closed.

As regards the first point, Mr. Thakor has relied upon Expl. 4, S. 499, I. P. C., and upon the judgment of Davar, J., in *Anandrao Balkrishna v. Emperor* (1). Apart from the decisions, it seems to me that the words of the section lend no support whatever to the contention urged on behalf of the applicants. The words of the section material to the point under consideration are that:

"Whoever makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said to defame that person."

Explanation 4 points out as to when an imputation is said to harm a person's reputation within the meaning of this section. But what is necessary to complete the offence is that there must be an imputation with reference to a person intending to harm, or knowing, or having reason to believe that such imputation will harm the reputation of the person against whom the imputation is made. The expression used in the section is:

"intending to harm or knowing or having reason to believe that such imputation will harm" and not "harming."

There is an obvious difference between the meanings of these two expressions and the argument based upon Expl. 4 involves the result that there is no difference between the two expressions. Such a result cannot be accepted. If the legislature intended that it was an essential part of the offence of defamation that harm should be caused to the reputation of the person against whom the imputation was made, the words

"intending to harm or knowing or having reason to believe that such imputation will harm"

could have been omitted and the word "harming" could have been easily substituted therefor to convey the meaning which is now sought to be put upon the section.

I do not say that the question of actual harm to the reputation of a person can never be relevant in determining the question of intention or knowledge or belief required by the section. In some cases it may be very useful to know whether any actual harm has resulted in determining whether the person making the imputation had the necessary intention or knowledge. But the proof of actual harm is not essential.

All the decided cases, except the one which has been relied upon by Mr. Thakor, are against his contention. In the case relied upon by him undoubtedly Davar, J., took the view which is in his favour. Heaton, J., took a different view in that case; and I expressed no opinion on the point as I did not consider it necessary for the purpose of the decision in that case to do so. The point however has been raised now and the view which found favour with Davar, J., has been relied upon before us. I have carefully considered all the reasons stated by Davar, J., in his judgment. With great respect, I am unable to agree with Davar, J., and agree with Heaton, J., on this point. I think that the offence in this case was complete without any proof of actual harm to the reputation of the person defamed.

The words used in this case are clearly defamatory. The words found to have been used by the first petitioner are these:

"What a liar you are, you are a worthless chap, you are a shameless priest, a robber, you have cheated Government."

The second petitioner is found to have used these words: "You have cheated Government, you have robbed Rs. 500 from Juvan." There can be no doubt that the person who used the words intended to harm the reputation of the person with reference to whom they were used.

The second point relates to the recording of evidence after the defence was closed in this case. It does not appear from the record whether this evidence was called by the Court under S. 540, Criminal P. C., and it must be taken for the purposes of the point which has been urged before us that it was adduced on behalf of the prosecution and not called for by the Court under the powers vested in the Court under S. 540, Criminal P. C. Taking that to be the fact, it is not

(1) A. I. R. 1915 Bom. 28=27 I. C. 657.

shown from the nature of the evidence recorded that it has any bearing upon the question as to whether the defamatory words were in fact used. Both the Courts in this case have found that the defamatory words were used by the accused; and it is difficult to see how the recording of this additional evidence at the stage at which it was recorded can be said to have prejudiced the accused. It is also important in connexion with the point of prejudice to remember that no objection was taken at the time on behalf of the accused. There is no allegation that this evidence was recorded in the absence of the accused. No objection was taken in the lower appellate Court as regards this evidence. These facts support the inference that there was no prejudice in this case to the accused from the evidence thus recorded. At the same time, I desire to point out that the procedure laid down in the Code with regard to the trials must be strictly followed. In the present case the procedure applicable was that provided for the trial of warrant cases by Magistrates and the scheme of the provisions relating to such trials must be followed subject to the special provisions of S. 540, Criminal P. C. The special powers under S. 540 may be exercised under proper circumstances. But I do not think that the recording of evidence on behalf of the prosecution after defence evidence is closed can be justified. It is undoubtedly an irregularity; and, though in this particular case it is condoned under S. 537, Criminal P. C., it is desirable to remember that it is an irregularity, which may at times necessitate a re-trial and which ought to be avoided.

I would discharge the Rule.

Crump, J.—So far as concerns the interpretation of S. 499, I. P. C. it appears to me that the interpretation contended for in this case leads to a contradiction between the body of the section and the Expl. 4, appended thereto. According to the body of the section, an imputation made with the intention to cause harm amounts to defamation, but if Expl. 4 is to be given the force which has been given to it in the decision relied upon, the result would be that it would be necessary to prove that harm was actually caused, whereas the intention to cause harm is sufficient under the first portion of the section. It is a cardinal

principle of statutory interpretation that a section should be read as a whole and that contradictions between portions of it should be avoided if possible. It seems to me that the meaning is really plain and that Expl. 4 is, what its name implies, an explanation and nothing more, being intended to define within certain limits the meaning of the words "an imputation intended to harm." Therefore I agree with the judgment of Heaton, J., in *Anandrao Balkrishna v. Emperor* (1) and also with the decision of the Allahabad High Court in *Queen Empress v. McCarthy* (2). It follows that the first point which is based upon the fact that no evidence has been adduced to prove actual harm must necessarily fail.

As to the second point, I have little to add to the observations of my learned brother. It is, I think, sufficient for the purposes of this case to say that the irregularity, such as it was, is cured by the provisions of S. 537, Criminal P. C., and even if it be not so cured the result, if we expunge from the record the evidence which was improperly admitted, will be precisely as it is so far as concerns the point before us. The conviction of the accused would, so far as we are concerned, rest upon precisely the same footing as if that evidence had been taken into consideration.

For these reasons, I concur in the order proposed.

G.P./R.K.

Rule discharged.

(2) [1887] 9 All. 420=(1887) A. W. N. 39.

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SHAH AND HAYWARD, JJ.

Pandurang Narayan Samant and others—Defendants—Appellants.

v.

Bhagwandas Atmaramshet — Plaintiff—Respondent.

Second Appeal No. 460 of 1916, Decided on 23rd September 1919, from decision of Asst. Judge, Thana, in Appeal No. 601 of 1913.

(a) **Hindu Law—Alienation — Antecedent debts—Prior debts due partly to mortgagee and partly to others are binding on sons.**

An alienation by way of mortgage to pay off antecedent debts incurred by the mortgagor prior to the mortgage, and due partly to the mortgagee and partly to others, is an alienation in respect of antecedent debts, and can be enforced against the sons of the alienor.

[P 342 C 1]

(b) Hindu law—Alienation — Co-parcener can alienate his joint share for consideration.

In the Bombay Presidency the rule prevails whereby a co-parcener can alienate his share in joint family property for consideration.

[P 342 C 2]

Bahadurji, S. R. Bakhale and B. V. Desai—for Appellants.

Jayakar and H. V. Divatia—for Respondent.

Shah, J.—This appeal arises out of a suit filed by the sons of the original mortgagee against the sons of the original mortgagor to enforce the mortgage executed on 1st June 1891 by the defendants' father Narayan in favour of the plaintiffs' father. Both the lower Courts have allowed the plaintiffs' claim.

In the appeal before us it has been argued that the mortgage was null and void as it was executed by Narayan not for an antecedent debt but for a debt incurred at the time of the mortgage. The mortgage bond contains the following recital:

"After taking accounts of the past dealings by me with you, I find myself indebted to you for a sum of Rs. 700, and today I have taken Rs. 799 to pay off the debts due to others, so in all I have to pay you Rs. 1,499."

The property mortgaged was the ancestral property of Narayan. The lower appellate Court has found, and it is not disputed before us, that the recital as to the consideration in the deed is true. Thus as regards Rs. 700 the debt was clearly antecedent. It is however contended that the sum of Rs. 799 borrowed at the time of the mortgage to pay the debts due to others cannot be treated as an antecedent debt in view of the decision in *Sahu Ram Chandra v. Bhup Singh* (1). It seems to me however that having regard to the observations cited with approval by their Lordships at p. 136 (of 44 I. A.) of the report, it is clear that the object of this alienation by way of mortgage was to pay off the antecedent debts incurred by the father prior to the mortgage. These debts were partly due to the mortgagee himself and partly to others. There is nothing in the judgment of *Sahu Ram Chandra v. Bhup Singh* (1) which supports the contention urged before us that the antecedent debts must be due to the mortgagee himself and that the object of the alienation must be to satisfy the antecedent debts due to the alienee. If, as is the case

here, the money is borrowed on the security of a mortgage to pay off the antecedent debts, it would be an alienation in respect of antecedent debts according to the decision which has been relied upon on behalf of the appellants. I see therefore no force in the contention that the mortgage cannot be enforced against the sons as it is not shown to be for an antecedent debt.

It is further argued in support of the appeal that Narayan, who was then joint with his brother Damodar, had no power whatever to mortgage the joint property. In this Presidency however the rule is well established that a co-parcener can alienate his share in the joint family property for consideration: see *Vasudev Bhat v. Venkatesh Sanbhav* (2) and *Fakirapa v. Chanapa* (3). It is urged that this cannot be treated as a good rule in view of the decision in *Sahu Ram Chandra v. Bhup Singh* (1). That was however a case which went up to the Privy Council from the High Court at Allahabad, and no doubt with reference to that case the position as stated at p. 130 (44 I. A.) of the report, that

"under the law of the Mitakshara the joint family property owned, as stated, by all the members of the family as co-parceners, cannot be the subject of a gift, sale, or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners,"

was perfectly applicable. But there was no question in that case as to the correctness of the rule recognized in this Presidency that a co-parcener can alienate his undivided share in the family property for consideration. The general proposition which has been relied on on behalf of the appellants must be taken to have been made with reference to the particular case and cannot be treated as overruling the current of decisions of this Court on that point. We must therefore give effect to the rule as recognized in the Presidency and must hold that the mortgage was valid so far as it related to Narayan's share in the property mortgaged.

Lastly, it is urged that the suit is barred under Art. 120, Lim. Act. It is clear however that that article cannot apply to a suit based on a mortgage. The point was urged on the footing that the mortgage was void. But the point

(1) A. I. R. 1917 P. C. 61=39 All. 437=44 I. A. 126=39 I. C. 280 (P. C.).

(2) [1873] 10 B. H. C. R. 139.

(3) [1873] 10 B. H. C. R. 162.

as to the validity of the mortgage having failed, this point also must fail.

The result is that the decree of the lower appellate Court must be confirmed and the appeal must be dismissed with costs.

Hayward, J.—I concur with the conclusions and reasons of my learned brother.

G.P./R.K. *Appeal dismissed.*

A. I. R. 1920 Bombay 343

Full Bench

MACLEOD, C. J., HEATON AND
KAJIJI, JJ.

Vithaldas Khandas Soni—Defendant
1—Appellant.

v.

Jamietram Maneklal—Plaintiff—Respondent.

Second Appeal No. 509 of 1918, Decided on 20th January 1920, from decision of Dist. Judge, Surat, in Appeal No. 802 of 1916.

Mahomedan Law—Pre-emption—Neighbours have equal right of pre-emption under Hanafi School.

Under the Hanafi School of Mahomedan law neighbours have an equal right to pre-empt. In a competition therefore between two neighbours, each is entitled to an equal share of the property which forms the subject of pre-emption.

[P 844 O 1, 2]

Mirza and G. N. Thakore—for Appellant.

Faiz Tyabji and H. V. Divatia—for Respondent.

Order of Reference.—The plaintiff sued to obtain a deed of conveyance of the plaint house from defendant 2 by right of pre-emption. The parties are all members of one family, a pedigree of which is set out at p. 13. Defendant 1 was the owner of houses Z and Y. Defendant 2 was the owner of house X and the plaintiff bought house W from Thakoredas, the 1st cousin of defendants 1 and 2. Then defendant 1 bought house X from defendant 2. The plaintiff claimed that he had a right to obtain a deed of conveyance of this house by pre-emption. The parties come from Bulsar, and I think it is too late now to dispute the ruling in *Gordhandas Gir-dharibhai v. Prankor* (1), in which it was held that by local custom the Hindus of Gujrat have adopted the Mahomedan law of pre-emption, except that that case was considered in a case which came

from Kaira, viz., *Dahyabhai Motiram v. Chunilal Kishoredas* (2), and Beaman, J., and myself declined to extend its decision beyond the limits of Surat and Broach. It is admitted then that if the Hindu inhabitants of Bulsar can be said to have adopted the Mahomedan law of pre-emption, the plaintiff in this case has a right to pre-empt. But supposing defendant 2 had sold his house to a stranger, then defendant 2 would also have a right to pre-empt. The plaintiff's case is based on the assumption that if defendant 2 sold his house to defendant 1 and not to a stranger, he the plaintiff, alone had a right to pre-empt. Therefore he claimed the whole house. Against that defendant 1 claimed that he certainly had a right to pre-empt which was equal to that of the plaintiff, but that as he bought the house, the plaintiff's right to pre-empt was excluded.

The trial Court dismissed the suit on the ground that the plaintiff had not satisfactorily proved that he had performed the proper ceremonies without undue delay. This decision was reversed in appeal, and the learned District Judge directed that defendant 1 should pass a sale-deed to the plaintiff of half the house X on payment of Rs. 912-8-0. The learned Judge referred to two conflicting rulings on the point whether the plaintiff was entitled to pre-empt in the circumstances of this case. We have considered those rulings, viz., *Lalla Nowbut Lall v. Lalla Jewan Lall* (3), which supports the appellant, and the other, *Amir Hasan v. Rahim Bakhsh* (4), which is in favour of the respondents, and it seems to me from the latter decision, which considers all the texts on the point, certainly that the great preponderance of textual authority is in favour of the respondents. We therefore think that the judgment of the learned District Judge was right and the appeal fails and must be dismissed with costs. The cross-objections are dismissed with costs.

Macleod, C. J.—(3rd December 1919)
—Since this case was argued and before the judgment was signed, we have been referred to the case of *Gokaldas v. Par-tab* (5), in which this Court has taken

(2) A. I. R. 1914 Bom. 120=38 Bom. 188=29 I. O. 289.

(3) [1879] 4 Cal. 891=2 O. L. R. 319=1 Shome L. R. 212 (F. B.).

(4) [1897] 19 All. 466=(1897) A. W. N. 113.

(5) [1917] 85 I. O. 871.

(1) [1869] 6 B. H. O. R. (A. O. J.) 268.

a different view to that which we have expressed. We think therefore the best course would be to have the case re-argued before a Bench of three Judges.

Opinions

Macleod, C. J.—In this case there were four houses in one courtyard, and of these two belonged to defendant 1 in the suit, and one to the plaintiff. The 4th house was sold by defendant 2 in the suit to defendant 1, and thereupon the plaintiff filed this suit to obtain a deed of conveyance of the suit house from defendant 2 by right of pre-emption. The suit was dismissed in the first Court on the ground that the plaintiff had not established that he had proved that he had performed the necessary ceremonies without undue delay. In first appeal the decree was reversed. The learned Judge held that the plaintiff was entitled to get half the property from defendant 1. When the case was argued before us on second appeal, we were prepared to accept the decision of the first appellate Court, following the decision in *Amir Hasan v. Rahim Bakhsh* (4). But before the judgment was signed we were referred to the case of *Gokaldas v. Partab* (5) where the opposite view had been taken, and it was therefore necessary that the case should be argued before a Full Bench. We see no reason why the decision which we had come to on the first occasion should not be confirmed. In *Gokaldas v. Partab* (5) the learned Judges considered the conflict between the case of *Lalla Nowbut Lall v. Lalla Jewan Lall* (3) and *Amir Hasan v. Rahim Bakhsh* (4) and they considered that it was safer to follow the ruling which commended itself to the Calcutta Full Bench. Although they mention that the authorities showed that in this Presidency it has not been the custom to enforce the doctrine of pre-emption to the extent allowed in Allahabad, no cases were referred to. The decision of the learned Judges seems to proceed on the basis that it would cause serious practical inconvenience, and in many cases even injustice, if the right of pre-emption were to be exercised in fractions. Now it is admitted that the parties in this case come from the District of Bulsar where the Hanafi School of Mahomedan law prevails, and it must further be admitted that according to

Hanafi law neighbours have equal right to pre-empt. It must follow from that, that the plaintiff in this case must succeed unless we are prepared to decide the case, not according to Hanafi law, but according to some other principle. It has been suggested that we must only apply Mahomedan law where it is in accordance with the principles of justice, equity and good conscience. Admitting that, for myself I see nothing which is contrary to the principles of justice, equity and good conscience in allowing two neighbours who have equal rights of pre-emption to exercise them.

If *A* and *B* are neighbours with equal rights to pre-empt in the case of the sale of a neighbouring house, I do not see why, if *B* happens to be the first purchasee, *A* should be deprived entirely of his right to pre-empt. In fact, the only ground on which we can decide not to follow the principle of the Hanafi law would be on the ground of inconvenience. It may be said that it is not desirable that property should be held in fractions. That may be so on general principles, but certainly in this country it is a most common occurrence. But apart from that I should not myself say that mere inconvenience, resulting from the application of the Hanafi law, is a reason why we should not apply it. In my opinion therefore the appeal must be dismissed with costs. The cross-objections are dismissed with costs.

Heaton, J.—I agree that the appeal should be dismissed with costs. We have here the simplest possible case of competitors claiming pre-emption. The original owner of the house, defendant 2, sold it to defendant 1. Defendant 1 and the plaintiff are the only competitors for pre-emption, and it is found that under the law they are equally entitled to pre-empt. A very natural, and on the whole a very just decision in a competition of this kind is that each should take half. Their claims are equal in the eye of the law. Therefore says the law, let them be equally treated, and that is a sufficient and a satisfactory disposal of this case, because defendant 2, the vendor, apparently has nothing to say against it and defendant 1, the original purchaser, is apparently prepared to take half rather than get nothing. If he had said:

"Oh very well if I can only buy half the property I won't buy any at all, I cancel my purchase,"

then the affairs would have to be differently viewed. I do not wish to express any opinion as to what in that event my decision would be.

Kajiji, J.—I agree.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 345

MACLEOD, C. J. AND HEATON, J.

Adiveppa Nagappa Arsingadi—Appellant.

v.

Toutappa Tippanna Ranganwar—Respondent.

Second Appeal No. 38 of 1918, Decided on 11th September 1919, from decision of Asst. Judge. Dharwar, in Appeal No. 37 of 1917.

Hindu Law—Widow—Acceleration—Whole estate must get vested at once—Gift if for consideration, acceleration does not take place.

In order that an acceleration by a Hindu widow of her life-estate should be valid, it is essentially necessary that the widow should withdraw her own life-estate, so that the whole estate should get vested at once in the grantee.

[P 345 C 2]

If there is any consideration for gift by the widow of her life-estate, that must prevent it taking effect as an acceleration, and must turn the transaction into an alienation. [P 346 C 1]

V. V. Bhadkamkar—for Appellant.

H. B. Gumaste—for Respondent.

Macleod, C. J.—The plaintiff sued to recover possession of the plaint property with past mesne profits for the year 1914-15, with future mesne profits and costs from the defendants. The land in suit belonged originally to one Shiddava, who had a life-estate. On 3rd August 1911, she made a gift of her property to her daughter Laxmava. Laxmava died on 29th January 1914, leaving a daughter who died on 31st January 1914, leaving her husband, the plaintiff in this case, her surviving. Defendant 1 is the husband of Laxmava and defendants 2 and 3 are his sons. The plaintiff's case is that Shiddava's gift to his wife and her daughter Laxmava operated as a valid acceleration of Laxmava's interest as the nearest reversioner at the time, and that therefore the property went to Laxmava's daughter and from the daughter to the plaintiff, even if that daughter was married.

The trial Court dismissed the plaintiff's claim. It found on issue 3, whe-

ther the gift to Laxmava by Shiddava was an acceleration of Shiddava's estate, in the negative. The learned Judge said:

"In the end the donor makes it a condition precedent for her maintenance till death to the said bequest. The learned pleader for the plaintiff concedes (sic) that the disposition can be a valid gift under Hindu law. The only point then is whether it amounts to an acceleration of Shiddava's estate. The simple test to be applied in the present case is whether the donor could or could not maintain successfully an action on the deed of gift in case she were not maintained by the donee. I hold that she could. It therefore follows that Shiddava by no means disposed of her entire life-estate by the execution of the deed."

The decree dismissing the plaintiff's claim was set aside by the lower appellate Court, which held that the acceleration under the gift of Shiddava to Laxmava was valid. The learned Judge seemed to consider that the widow who gave away her life-estate in favour of the nearest reversioner, with a condition attached that the donee should maintain her, could succeed in a suit for maintenance even although the acceleration were upheld. I do not think that this argument is sound. In order that an acceleration by a Hindu widow of her life-estate should be valid, it was laid down in *Behari Lal v. Madho Lal Ahir Gayawal* (1) that it was essentially necessary that the widow should withdraw her own life-estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate was a practical check on the frequency of such conveyances. In *Moti Raiji v. Laldas Jibhai* (2), Mr. Justice Beman explained the difference between an alienation by a widow, and acceleration by her which had the effect of putting an end to her life estate and vesting the estate in the nearest reversioner. In that case it was arranged that one third of the property should come back to the widow and on that ground it was held that the acceleration was invalid. Mr. Heaton, J., in his judgment cited the case which I have just referred to, viz., *Behari Lal v. Madho Lal Ahir Gayawal* (1). He went on to say:

"That clearly brings out the idea that for an acceleration there must be an absolute annihilation of the widow's interest, as complete as if she were dead."

(1) [1892] 19 Cal. 286=19 I. A. 30=6 Sar. 88 (P. C.).

(2) [1917] 41 Bom. 99=37 I. C. 945.

But that case does not touch the exact question which we have before us in this case. I agree with what was said in *Sriramulu Naidu v. Andalammal* (3). There the widow gave the property to the nearest reversioner on certain conditions. Under it the donee had not only to provide for the maintenance of the transferor, but had also during her lifetime to pay annually to one of her dependants Rs. 84, and to maintain a charity for all time at an annual expense of Rs. 50. Further, on her death, he had to make payment on different accounts aggregating Rs. 2,400. The Judges said:

"Of course, Raghavalu would not have been subject to any of the obligations cast upon him by the deed of gift, were the property to devolve on him by inheritance in the usual course. The transaction was thus essentially an onerous gift and therefore an alienation by her, the validity or invalidity of which was determinable with reference to the rules of Hindu law, governing transfers by qualified female proprietors."

It seems to me that if there is any consideration for the gift by the widow of her life-estate, that must prevent it taking effect as an acceleration, and must turn the transaction into an alienation. That seems to me a sound logical principle to act upon, because if we were to enter into a discussion as to whether this consideration was so small that we should overlook it, then that would open the door to all sorts of discussions in later cases as to the quantum of consideration. It seems preferable to say at once that any consideration is sufficient to change the nature of the transaction from an acceleration to an alienation.

It has been urged before us that the donee in this case took the property with an obligation under Hindu law to maintain the donor. But it seems to me that there is a fallacy underlying that argument, because the donor Shiddava in this case had a life-estate, and it would not follow that because she got rid of that life estate in favour of the nearest reversioner, that there was any obligation under Hindu law on that nearest reversioner to maintain Shiddava. For these reasons, in my opinion, the decree of the lower appellate Court should be set aside and the decree of the trial

Court made good, so that the appeal will be allowed with costs.

Heaton, J.—I agree.

G.P./R.K.

Decree set aside.

A I. R. 1920 Bombay 346

HEATON AND MARTEN, JJ.

Hiralal Ambalal and others—Plaintiffs
—Appellants.

v.

Gopalji Kallianji and others—Defendants—Respondents.

Original Civil Appeal No. 58 of 1919 in Suit No. 166 of 1919, Decided on 17th November 1919, against judgment of Macleod, C. J.

Contract—Variation—Plaintiff contracting to sell to defendants goods to be purchased from M—Defendants agreeing to sell same to M—Contract held varied inasmuch as taking delivery was cancelled—Plaintiff held entitled to difference in rates only—Damages—Breach of contract—Measure of.

Plaintiffs contracted to buy certain goods from one M. which they agreed to sell to the defendants. Subsequently, it was agreed between the parties that the defendants should pay M. direct against delivery and should get M. to give credit to the plaintiffs for the amount. Defendants agreed to sell the same goods to M., and therefore failed to take delivery. Plaintiffs sued the defendants for damages.

Held: (1) that the intention of the original contract between the plaintiffs and the defendants that there should be delivery by the former to the latter was subsequently modified and there was in fact to be no delivery;

(2) that the plaintiffs were only entitled to the difference between the price which they had agreed to M., and the price which defendants had agreed to pay to them. [P 347 C 1, 2]

Campbell and Desai—for Appellants.

Kanga and Kania—for Respondents.

Heaton, J.—We do not think it necessary to call upon the respondents.

This case is one in which the plaintiffs sued for damages for the breach of a contract on the ground that the defendants, to whom they had sold certain goods, had failed to take delivery. When the case came on for hearing there was put in certain correspondence, and it was admitted that there were three contracts relating to these goods. The first was the sale by Mathuradas to the plaintiffs; the second was the sale by the plaintiffs to the defendants, which is the contract for the breach of which the plaintiffs sue, and the third was the sale by the defendants back to Mathuradas, the original vendor. It was further admitted that these contracts related to precisely the same goods. Counsel who appeared for the plaintiffs in the Trial Court, there

said that if the Court thought that on the admitted facts there was only a claim for difference he did not wish to contest the case further; and the Court gave judgment according to the evidence.

The main point taken in appeal is that this case must be decided exclusively on a consideration of the contract between the plaintiffs and defendants and the Court had no right to take into account any later contract between the defendants and Mathuradas, or to take into account the effect such a contract might have on the dealings between the plaintiffs themselves and the defendants.

Now, in the circumstances which I have stated, one would naturally infer, particularly as it is also admitted that the goods sold were in the godown of Mathuradas and had been there all the time, that the understanding between the parties either was or came to be that there should not in fact be actual delivery. The goods had been sold to the plaintiffs, then to the defendants, then back to the original vendor who had them and had them all the time. But, of course, it might be entirely wrong to draw this inference merely from the pleadings and the correspondence put in when no further evidence had been heard in the case. I will assume that it would be wrong, yet in this case the plaintiffs' plaint itself places the matter on a safer basis than mere inference. It shows that there was a modification of the original contract between themselves and the defendants because the plaint states:

"It was agreed that the defendants should pay Messrs. Mathuradas Morarji direct against delivery and should get the said Messrs. Mathuradas Morarji to give credit to the plaintiffs for the amount paid."

That seems to me to justify any Court in holding that the intention of the original contract that there should be delivery by the plaintiffs to the defendants was subsequently modified and there was, in fact, to be no such delivery. The delivery required to give effect to the modified contract between the plaintiffs and defendants would be a delivery by Mathuradas, not by the plaintiffs, to the defendants, and that of course was rendered unnecessary by the contract between the defendants and Mathuradas by which the former sold the goods back to the latter.

On this state of facts therefore it

seems to me quite impossible to assume that there could conceivably be a breach of contract on the part of the defendants by reason of their not taking delivery. That being so, the only thing the defendants have failed to do is to pay the price. And I think the decree of the lower Court is correct and that the appeal should be dismissed with costs.

Marten, J.—The appellants' case here is really based on the case of *Williams Brothers v. Ed. T. Aguis Limited* (1), and it is said, on the authority of that case, that the trial Judge applied the wrong measure of damages in arriving at the figure that he did in the present case. Now, the House of Lords case decides that, where there are three contracts, very much the same as we have here, then as between the parties to the original contract No. 1, if there was a breach by the original vendor, the damages must be assessed in the ordinary way, viz., by ascertaining the difference between the contract price and the market price at the date of the breach, and not by reference to what the original purchaser purports to have done under his sale to another person under contract No. 2. That is the law laid down by the House of Lords.

Now, that authority would, I think, be binding upon us here if we merely had three contracts and nothing more. What differentiates, in my opinion, the present case from the House of Lords case is that here there was an express agreement between the plaintiffs and defendants that the contract between them should not be carried out in the ordinary way but that the defendants should pay Mathuradas the original vendor. It will be remembered that there were three contracts of sale, viz.: (1) Mathuradas to the plaintiffs dated 4th September 1918, at Rs. 11-2-0; (2) plaintiffs to defendants dated 7th September 1918, at Rs. 11-8-0; and (3) defendants to Mathuradas, dated 8th September 1918, at Rs. 11-12-0. I disregard the second range of prices in each contract, as the net result is the same. The agreement I have referred to as pleaded in para. 4 of the plaint is:

(1) [1914] A. O. 510=88 L. J. K. B. 715=110 L. T. 865=19 Com. Cas. 200=58 S. J. 377=30 T. L. R. 351.

"It was agreed that the defendants should pay Messrs. Mathuradas Morarji direct against delivery and should get the said Messrs. Mathuradas Morarji to give credit to the plaintiffs for the amount paid."

I regard that agreement as a variation of the contract No. 2, and that the two must be read together.

Now, that being so, what is the proper result if one assumes that the defendants broke their contract with the plaintiffs? I should say that the correct measure of damages would be such as would put the plaintiffs in the same position as if their contract No. 2, as varied by the above agreement, had been carried out. In that case, the plaintiffs get Rs. 11-8-9 minus Rs. 11-2-0 which equals annas 6. But annas 6 is what the learned Judge has given them in the Court below, and, in my opinion, that was the right rate per piece.

It follows that, in my opinion, the appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 348

MARTEN, J.

Weld & Co.—Plaintiffs.

v.

Sher Ahmed Ekbal Ahmed and another—Defendants.

Ordinary Original Civil Suit No. 1170 of 1916, Decided on 16th June 1919.

Contract Act (9 of 1872), S. 23—Suit to recover losses on cotton contracts—Third party pleading agreement between plaintiff and defendant—Agreement by defendant to pay half of losses and helping plaintiff to recover balance from third party—Accounts and transaction admitted—Third party pleading agreement as fraudulent and as of champerty—Accounts etc., being admitted decree against defendant must be passed—Transaction being not illegitimate held not to be invalid.

Weld & Co. brought a suit to recover from the defendant losses on certain cotton contracts, based on an account the correctness of which was not disputed. In this suit the third party, i. e., the party who undertook to indemnify the defendant against losses, appeared as a party, and put in an agreement of compromise between the plaintiff and defendant entered into after admission of the suit, and alleged that the effect of this agreement was that the defendant was to pay plaintiff half the sum for which the suit had been brought and as regards the balance he was to bring a third party notice against the third party; that the plaintiff and defendant were to share the balance equally, and that defendant obtained this concession by agreeing to give evidence against the third party, and that, consequently, the agreement was fraudulent,

collusive and against public policy, and that no decree should be passed against the defendant:

Held: (1) that as the account had been proved and also that the transactions entered therein did take place between the plaintiff and defendant which resulted in a loss for which defendant was liable, the agreement furnished no sufficient ground for not passing a decree against the defendant; (2) that inasmuch as champerty is not void in India unless the transaction is not a bona fide one for the acquisition of an interest in the subject of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive, the agreement did not fall within the description of an illegitimate transaction, and was therefore not invalid. [P 349 C 1, 2]

Judgment. — This is a claim for Rs. 55,783-9-4 on cotton contracts. There are also third party proceedings under an order of 5th October 1917 which provides

"that the third party be at liberty to appear at the trial of this action and take such part therein as he may be advised and be bound by the result of the trial and . . . that the question of the liability of the third party to indemnify the defendant be tried at the trial of this action, but subsequent thereto."

I am now, in the first instance, trying the action, which involves the question of the direct liability of the defendant to the plaintiffs. The defendant did not dispute his liability to the plaintiffs for the amount claimed. Counsel for the third party, as I understood him, said he could not dispute the account, Ex. E to the plaint, as between the plaintiffs and the defendant, but he was not prepared to say he would not dispute it at all. I did not altogether follow the precise effect of this distinction, and I therefore thought it best to let the plaintiff prove his case, and then to allow any question to be asked in cross-examination which either counsel should think proper, subject to the issues and the pleadings.

That accordingly has been done. The result is that, so far as the account itself is concerned, which is Ex. E to plaint, and is shown in the ledger, Ex. G, there is no dispute on the evidence that these transactions took place between the plaintiffs and the defendant and resulted in a loss of Rs. 55,783 for which the defendant was liable to the plaintiffs.

It is however admitted by the plaintiffs that Rs. 28,000 have, since the filing of the plaint, been paid by the defendant and that, accordingly, that sum must be taken into account in arriving at the decree to be passed in this suit.

The third party called no evidence, but he put in an agreement of compromise entered into between the plaintiffs and the defendant on 2nd February 1917. I should say the plaint was admitted on 30th October 1916. He (the third party) says that this document was fraudulent and collusive and against public policy and that, accordingly, I ought not to pass any decree against the defendant, more especially as the sum of Rs. 28,000 has been paid thereunder. He says the effect of this agreement was that the defendant was to pay Rs. 28,000 of the Rs. 55,783 and that, as regards the balance of the claim, he, the defendant, was to bring a third party notice against the third party and that thereafter the plaintiffs and defendant were to share the balance equally, and that the defendant got this concession in consideration of his agreeing to give evidence against the third party.

The defendant says the agreement speaks for itself, and that no other evidence of fraud is necessary. In the first place, I hold, that the account, Ex. G, has been proved, and that these transactions did take place between the plaintiffs and the defendant, and that they resulted in a loss of Rs. 55,000, odd, for which the defendant was liable.

Next, after considering the compromise agreement of 2nd February 1917 and the arguments of the learned counsel, I hold that this agreement furnishes no sufficient reason why I should decline to pass judgment for the plaintiffs in respect of those bona fide transactions which took place between them and the defendant, allowing, of course, for the Rs. 28,000 that has been paid. When it comes to the issue of indemnity between the third party and the defendant, other questions as to the effect of this compromise may arise. I however decline to hold that this agreement, by itself and on the very face of it, is a fraudulent agreement on the part of the plaintiffs.

Mr. Kemp has cited two cases, one of *Bulli Coal Mining Co. v. Osborne* (1) and another in *Tarachand v. Sukhlal* (2). He has drawn my attention, particularly, to the passage on p. 353 in the Privy Council case, where the Chief Judge of New South Wales said in his judgment:

"We are of opinion that the agreement in question is in no sense champertous, as it appears to us to be obvious that both the Messrs. Osborne and the Bellambi Coal Mining Co., have 'an interest in the thing at variance,' in which case, as pointed out in 1st Hawkins Pleas of the Crown, 456, the parties are justified in entering into an agreement respecting a matter in which they have legally or equitably a common interest."

Then, on p. 359, Lord James, in delivering their Lordships' judgment said:

"The leading counsel for the appellants intimated that he felt he could not rely upon this defence of champerty, and virtually withdrew it. Their Lordships are therefore relieved from delivering any judgment upon the subject, beyond saying that they see no ground for differing from the judgment delivered on this head by the Full Court."

In that case, the common "interest in the thing at variance" was of a landlord and tenant in relation to coal which had been abstracted by another party. It may therefore be said that it was rather easier in that case than in this to say that the two parties had a common interest in the thing at variance. Here, I suppose, "the thing at variance" would be the incidence of the loss on the cotton contracts, but the plaintiffs could hardly have a common interest in making the third party bear the loss unless the defendant was financially weak.

The other case, in 12 *Bombay*, goes to show that champerty is not void in India unless the transaction was not a

"bona fide one for the acquisition of an interest in the subject of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive."

Taking that test, I think this agreement does not fall within the description of an illegitimate transaction referred to in that decision.

But, even if the compromise agreement was invalid, I heard no adequate argument from counsel for the third party why the plaintiffs could not recover from the defendant on their original claim. Further, in considering the effect of the compromise agreement, it would seem that the Rs. 55,783 claimed by the plaintiffs is not the total loss but the balance of a larger loss after allowing for margin and other moneys paid by the defendant as appears by the contracts Ex. A and the ledger Ex. E. It may be therefore that, even if the defendant retains Rs. 13,891 under the compromise agreement, viz., half of the balance of Rs. 27,783 to be recovered from the third

(1) [1899] A. C. 351=68 L. J. P. C. 49=80 L. T. 480=47 W. R. 545=15 T. L. R. 257.

(2) [1888] 12 Bom. 559.

party, he will still be out of pocket, unless he recovers the above margin and other moneys as well. In that event, it could not be said that he obtained any benefit at the expense of his principal.

In the result, I pass a decree against the defendant for the amount of Ex. G, but in that decree credit must be given for the Rs. 28,000 already paid and the precise amount must be mentioned to me.

G.P./R.K.

*Suit decreed.***A. I. R. 1920 Bombay 350 (1)****SHAH AND CRUMP, JJ.***In re Valli Mitha—Applicant.*

Criminal Appln. No. 298 of 1919, Decided on 17th November 1919, from order of Acting Fourth Presidency Magistrate, Bombay.

Criminal P. C. (5 of 1898), S. 250—Order of compensation under S. 250 cannot be made on complaint under Bombay Public Conveyances Act (6 of 1887), S. 28.

Section 28, Bombay Public Conveyances Act, provides a summary remedy for the recovery of the legal fare of a public conveyance, and a complaint under the section is not a complaint in respect of an offence within the meaning of S. 250, Criminal P. C. A Magistrate therefore has no power to make an order awarding compensation under S. 250, Criminal P. C. in respect of such complaint. [P 350 C 1, 2]

Ratanlal Ranchhoddas — for Applicants.

S. S. Patkar, Govt. Pleader—for the Crown.

Shah, J.—In this case a victoria driver lodged a complaint against the opponent under S. 28, Bombay Act 6 of 1867, in the Court of the Fourth Presidency Magistrate for the lawful fare due to him. The Magistrate found against the complainant on the merits and held that what the opponent had offered was the proper legal fare. He however held that the complaint was vexatious and ordered the complainant to pay to opponent Rs. 25 as compensation under S. 250, Criminal P. C. Having regard to the language of S. 28 of the Act it appears that it provides summary remedy for the recovery of the legal fare and that a complaint under the section is not a complaint in respect of an offence within the meaning of S. 250, Criminal P. C. It is clear from the language of the other sections in the Act that when the Legislature intends that a particular act or omission should be treated as an offence, appropriate language is used to indicate the intention. Here in S. 28 reference

is made to the fare and reasonable compensation for loss of time. It cannot be said that the omission to pay the legal fare is made punishable under the section. I do not think that the last clause which empowers the Magistrate to sentence the defaulter to imprisonment, for default of payment of the sums referred to in the previous part of the section, makes the alleged omission on the part of the party against whom the complaint is made under the section an offence. The Magistrate had therefore no power to make an order under S. 250, Criminal P. C., in this case. It is not necessary to examine whether on the merits the order of compensation is proper. I would set aside the order of compensation and direct the amount, if paid, to be refunded to the complainant.

Crump, J.—I agree.

G.P./R.K.

*Rule made absolute.***A. I. R. 1920 Bombay 350 (2)****MACLEOD, C. J. AND HEATON, J.**

Taramiya Pirsahab Patarjet and others
—Defendants—Appellants.

v.

Shibelisaheb Fakirsahab Dundage—
Plaintiff—Respondent.

Appeal No. 49 of 1918, Decided on 5th December 1919, from order of Dist. Judge, Belgaum, in Appeal No. 54 of 1918.

Limitation Act (9 of 1908), Arts. 134 and 148—Transfer by mortgagee—Redemption suit is governed not by Art. 134 but by Art. 148.

A mortgagor's right to redeem, the period of limitation for which is 60 years under Art. 148, Sch. 1, Limitation Act, is not defeated merely because his mortgagee transfers the mortgage to another. A suit therefore by a mortgagor to redeem a mortgage which has been transferred by the original mortgagee to another person, is not governed as to limitation by Art. 134 of the foregoing Schedule. [P 351 C 1]

P. B. Shingne—for Appellants.*A. G. Desai*—for Respondent.

Macleod, C. J.—This was a suit for redemption against a large number of defendants to redeem certain survey numbers from a mortgage executed by the plaintiff's father to certain mortgagees. A decree was passed by the lower Court declaring that there was nothing due on the plaintiff mortgage and directing that the plaintiff should recover possession of the plaintiff mortgaged lands, except the mortgaged portions of Survey

Nos. 95, 104 and 525, from the defendants that might be in possession of the same. The plaintiff's claim for possession of plaintiff portions of Survey Nos. 95, 104 and 525 was dismissed.

In appeal the lower appellate Court has held that the plaintiff can recover possession of those three Survey Nos. 95, 104 and 525 upon paying what might be found due to defendants 19, 23, 24 and 25 on an account being taken under the Dekkhan Agriculturists' Relief Act. These particular defendants have now appealed. They claim that the plaintiffs' suit as against them is barred under Art. 134, Limitation Act. That Article refers to a suit to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration. In this case apparently the argument is that because the defendants are mortgagees from the original mortgagee of these survey numbers, the plaintiff's suit as against them is barred after 12 years from the date of the transfer of the original mortgage. The case of *Bagas Umaraji v. Nathabhai Utamram* (1) appears to be conclusive on this question, for it appears obvious that a suit to recover possession is not the same thing as a suit to redeem and a mortgagor's right to redeem, the period of limitation for which is 60 years under Art. 148, will not be defeated merely because his mortgagee transfers the mortgage to another person. I agree with the argument of the learned appellate Judge in discussing this question, and the appeal therefore fails and must be dismissed with costs.

Heaton, J.—I agree that Art. 134, Sch. 1 to the Limitation Act, does not cover the case we are dealing with. The suit is a suit for redemption and such a suit is covered by Art. 148. The mortgage debt has been paid off by the profits of the land, the mortgaged property being in the possession of the mortgagee. So far therefore the plaintiff is entitled to possession of the whole of the mortgaged property. But his claim is resisted in respect of three survey numbers by certain of the defendants who purchased these numbers from the mortgagee. Of course the mortgagee had no right to sell them, and so these defendants have not acquired any title merely by reason of

their purchase. At least they have not acquired anything better than such title as the mortgagee could convey to them. Being without title to the property, or at any rate, a title which enables them to resist the plaintiff on the ground, they must of course surrender possession to the plaintiff, unless they have a claim on some other ground, the only ground so far as I can see, on which they could have a claim would be adverse possession. They have been placed in the position of mortgagees by the lower Court. The debts due to them which are the prices paid by them for their purchases, are to be paid by the plaintiff claiming redemption. That is the most they could possibly be entitled to unless they establish a title by adverse possession against the plaintiff-mortgagor who seeks to redeem. Whether they have done so or not is primarily a question of fact. It has been found by the lower appellate Court that they have not established a title by adverse possession other than a title to be redeemed. Nothing has been said to us in argument in this appeal to lead us to suppose that the lower appellate Court made any mistake of law in arriving at this conclusion. I agree therefore that this appeal must be dismissed with costs.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 351

MACLEOD, C. J. AND HEATON, J.

Ibrahim Harun Jaffer—Defendant—Appellant.

v.

Jusaf Hussain Jaffer—Plaintiff—Respondent.

First Appeal No. 149 of 1917, Decided on 3rd December 1919 from decision of First Class Sub-Judge, Poona, in Civil Suit No. 60 of 1913.

Civil P. C. (5 of 1908), O. 9, R. 13—*Ex parte decree—Suit to set aside is not maintainable unless obtained by fraud.*

An ex parte decree can only be set aside in the manner provided in O. 9, R. 13. A Court will not entertain a suit to set aside such a decree unless it can be proved that the decree was obtained by fraud. [P 352 C 1]

B. J. Desai and S. Y. Abhyankar—for Appellant.

Bahadurji and J. R. Gharapure—for Respondent.

Judgment.—The plaintiff filed this suit to set aside a decree directing an award between the parties to be filed.

(1) [1912] 86 Bom. 146=12 I. C. 787.

The ground on which he asked for this relief, as appears in the plaint, was that the decree in terms of the award was passed on 7th January 1913 ex parte without notice of the date of hearing being served on the plaintiff. It may be that there were vague allegations of misconduct and fraud in the plaint, but there were no particulars given of such fraud as is required by the rules of pleading, and it is quite clear that the case went to trial only on the question whether the plaintiff was entitled to have the award decree set aside on the ground that it was made ex parte. The learned Judge in the lower Court held that the plaintiff was entitled to have the ex parte decree in Suit No. 377 of 1912 set aside and awarded the claim with costs. Now it is perfectly well recognised that it is only on certain grounds that the Court will entertain a suit to set aside a decree and that is, if it can be proved that the decree has been obtained by fraud. Otherwise there would be no end to litigation. An unsuccessful party cannot then file another suit to set aside a decree because he is not satisfied with it, on any other ground except fraud. O. 9, R. 13 of the Code prescribes the course which should be followed by a party against whom a decree has been passed ex parte. He has to apply to the Court which passed the decree for an order to set it aside. If he succeeds in satisfying the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing the Court is entitled to make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, or the party against whom an ex parte decree is passed may appeal, but he certainly cannot start a fresh proceeding to set aside the decree. That has already been decided in other High Courts: see *Narsingh Das v. Bibi Rafikan* (1) and *Puran Chand v. Sheodat Rai* (2). The learned Judge therefore in the Court below was wrong in allowing the plaintiff's claim and the appeal must be allowed and the suit dismissed with costs throughout.

It appears in a pleading by the plaintiff in reply to the defendant's written state-

ment that the plaintiff asked the Court to treat his counter-written statement if necessary, as an application to set aside the ex parte decree and re-hear the Suit No. 377 of 1912. The Judge considered this question but decided that the plaint in the suit could not for the reason he gave be treated as an application made in time to set aside an ex parte decree under O. 9, R. 13. The proper course for the plaintiff to follow then was to put in an application under O. 9, R. 13, and ask the Court to excuse the delay under S. 14, Lim. Act and we think it is still open to him to follow that course and file an application under O. 9, R. 13. For the present this suit was wrongly filed. We may note that the suit itself was filed within the time prescribed by the Limitation Act for an application under O. 9, R. 13.

G.P./R.K.

Appeal dismissed.

A. I. R. 1920 Bombay 352

MARTEN, J.

Weld & Co.—Plaintiffs.

v.

Sher Ahmed Ekbal Ahmed and another
—Defendants.

Original Civil Suit No. 1170 of 1919,
Decided on 20th June 1919.

Contract Act (9 of 1872), Ss. 126 and 128
—Where loss incurred more than decreed—
Difference cannot be recovered in third party
notice nor can claim be split up.

Where in a suit under a contract or right of indemnity the real sum due by the defendant to the plaintiff for which the latter has obtained a decree is less than the real loss incurred by the defendant, the defendant cannot ask for a decree on a third party notice for this latter sum, nor can he be allowed to split up his claim partly for the amount decreed, and partly for the difference between that amount and the total loss, as a term of being allowed to proceed with third party notice, that is to say, no other proceedings can be taken for the difference between the two amounts, and the case must proceed on the claim for indemnity as regards the first mentioned sum, i. e., the sum for which a decree has been passed. [P 353 O 2]

Judgment.—I have dealt with the claim in the suit and I am now on the third party notice. The claim in the suit has resulted in a decree for the plaintiffs Messrs. Weld & Co., against the defendant for a sum of Rs. 55,000 odd. This sum the defendant claims by his third party notice from his uncle, the third party, under a contract or right of indemnity.

I should say, at the outset, that having regard to certain margin moneys, approxi-

(1) [1912] 37 Cal. 197=5 I. C. 198.

(2) [1907] 29 All. 212=4 A. L. J. 51=(1907) A. W. N. 37.

mately Rs. 22,000, which were provided by the defendant and another sum of nearly Rs. 5,000 which represented profit made by the defendant on his own previous transactions with the plaintiffs, and which sum of Rs. 5,000 was left as further margin money, the real sum due by the defendant to the plaintiffs and the real loss incurred by the defendant is over Rs. 82,000. This fact is material on issues 2, 10 and 11 as to the effect of a certain compromise agreement of 2nd February 1917 between the plaintiffs and the defendant.

It seemed to me, however that on the pleadings the defendant could not ask for a decree on the third party notice for this sum of Rs. 82,000. At any rate, he has not asked that, but only wishes to deal with the Rs. 82,000 as an answer to issues 2, 10 and 11. At the outset, I asked his counsel what he was going to do as regards the balance of the claim, viz., the difference between the Rs. 82,000 the total loss, and the Rs. 55,000, the claim on the third party notice. After consideration, counsel for the defendant agreed to confine his claim to the Rupees 55,000 as a term of his being allowed to proceed with the third party notice. I mean by that that no other proceedings can be taken for the difference between the Rs. 82,000 and the Rs. 55,000. If the claim for the whole Rs. 82,000 had been proceeded with, I should probably have come to the conclusion that there must be one trial, and one trial only, for the whole Rs. 82,000, and that I could not allow it to be split up partly for the claim of Rs. 55,000 and partly (in other proceedings) for the balance of the Rupees 82,000. The case accordingly proceeds on a claim for indemnity as regards the Rs. 55,000 awarded by the decree in this suit against the defendant, the balance, if any of the total loss being abandoned, but with leave to prove such total loss in connection with issues 2, 10 and 11.

The explanation of these somewhat protracted proceedings is that the defendant and the third party are relatives, viz., uncle and nephew, and that the third party, at any rate, is disposed to fight his relative to the last possible moment. Substantially, the defendant's story, which he has told me, supported as it is, by a large body of documentary evidence none of which is in any way displaced, is really not contradicted by the third

party. In my opinion, the defendant's story as to the fact is the correct one.

The defendant says that some time prior to 21st May 1916 he had certain transactions with the plaintiffs in which he and the third party were acting in partnership, the shares being four-fifths and one-fifth. The market went against them and the defendant wanted to close. The third party was averse to this and consequently, the agreement of 21st May 1916, Ex. 4, was arrived at. The effect of that agreement was that the third party took over all outstanding transactions between the plaintiffs and the defendant, and for that purpose he, the defendant, was to act in effect as an intermediary between the plaintiffs and the third party for the purpose of giving orders in relation to future dealings with respect to these transactions. All matters were to be dealt with by the defendant, but it is quite clear from the agreement that the third party was to keep the defendant in funds.

Now on that agreement, it is contended by the third party, that the relationship of principal and agent did not exist between the defendant and the third party but that their true relationship was of vendor and purchaser or assignor and assignee. Even if one adopts that argument, it seems to me clear on the face of the document, that for certain purposes, viz., the carrying out of the terms of this agreement the defendant had to act as the agent of the third party. I won't refer to the clauses in detail but I am satisfied that to that extent, at any rate, the defendant was the agent of the third party. Even if that is incorrect, still, having regard to the fact that he was carrying out these terms in pursuance of this agreement and under the instructions of the third party, he would I think, be entitled to be indemnified against the consequences. So I hold that the effect of this agreement was that the defendant, if and so far as he acted on the instructions of the third party, was entitled to be indemnified.

I do not propose to go into the details of the transactions which on the instructions of the third party, took place with the plaintiffs. It is sufficient to say that an agreement was entered into with the plaintiffs Weld & Co., under which they were given certain Hundis—Hundis to the extent of a lac and half and an-

other ten thousand rupees, and that it was the duty of the third party to find money to meet these Hundis. He has not found a single pie. The plaintiffs naturally called for more margin, as the market was going against the defendant, but that margin was not provided by the third party. Eventually, the plaintiffs closed and the Rs. 55,000, odd, is the result of the loss sustained as at the closing date.

Personally, I do not think there has been any real answer in this Court to the defendant's claim and I think counsel for the third party only acted quite properly in stating that he really had no evidence from a legal point of view, to meet the case put forward by the defendant. However the third party was very anxious to go into the witness-box and accordingly I allowed him to do so and say anything he wanted. It was irregular in view of his Counsel's admissions, but I thought, under the circumstances I might overlook the irregularity. Having heard his grievances, I am quite satisfied that there is nothing whatever in them.

Now turning to the formal issues that have been raised in the case I have already dealt with issue 1. As regards issue 2, which I may take along with issues 10 and 11, this depends on a certain compromise agreement, Ex. 1 (a), 2nd February 1917, which was entered into between the plaintiffs and the defendant with reference to the present suit. The effect of that agreement was that the defendant was to pay at once Rs. 28,000 and as regards the balance of the Rs. 55,000 so much as might be recovered from the third party was to be divided in equal shares between the plaintiffs and the defendant, and the defendant was to assist the plaintiffs by his evidence and he was if necessary, to submit to judgment in the suit and to bring a third party notice against the third party.

Now if the result of this arrangement was that the defendant as agent would make the slightest profit out of the transaction then it might very well be that at any rate against his own principal, the third party this agreement could not stand. But when you look at it, it is clear that in any event, the defendant was bound to be a loser for he had already provided the difference between

the Rs. 82,000 the total loss and the Rs. 55,000 odd, claimed in this suit. This difference the agreement does not touch and accordingly he could make no profit. This difference arises from the margin money of some Rs. 22,000 and his own personal profit on another transaction of nearly Rs. 5,000. That was his own money. It has all gone. He will never get that back now from the third party.

Under these circumstances, I do not see anything fraudulent or collusive or against public policy whatever in this document and accordingly I shall answer issue 2 in the negative, and issue 10 in the affirmative and issue 11 in the negative.

The remaining issues I answer as follows:

3. Yes.

4. The effect of the agreement of 21st May 1916 was that as between the third party and the defendant, the third party took over the transactions in question.

5. Yes, including the starting balance of Rs. 29,246.

6. Yes.

7. No.

8. Yes.

9. No.

In conclusion, I will add that the third party is a tea merchant, living in Peshawar. I do not suppose he has any real knowledge of cotton. In the future, I think he will be well advised to leave cotton speculations alone and to attend to his own business.

G.P./R.K.

Issues decided.

A. I. R. 1920 Bombay 354

MACLEOD, C. J. AND HEATON, J.

Murgeppa Basappa Gavannavar —
Plaintiff—Appellant.

v.

Kalva Golappa Totad—Defendant—
Respondent.

Second Appeal No. 1052 of 1917, Decided on 9th November 1919, from decision of Dist. Judge, Bijapur, in Appeal No. 107 of 1916.

(a) **Hindu Law—Adoption—Widow—Adoption before attaining puberty is void and is not rendered valid by subsequent conduct.**

An adoption by a Hindu widow who has not reached puberty is invalid ab initio, and the mere fact that the adopting mother when she grows older raises no objection to the adoption, would not validate it.

(b) **Hindu Law—Adoption—Widow—Person adopting must have attained age of discretion.**

In order to be able to make a valid adoption the adopting widow must have reached such an age of discretion that she must be able to realise the importance of her act, to make up her own mind as to the person she ought to adopt.

Per *Heaton, J.*—A person making an adoption must be capable of volition of his or her own.

[P 355 C 1, 2]

G. S. Mulgaonkar—for Appellant.

H. B. Gumaste—for Respondent.

Macleod, C. J.—The only question in this appeal is whether a girl, a Hindu widow, of the age of twelve who has not reached puberty could make a valid adoption. Both Courts have held that the adoption in those circumstances was invalid. As an authority para. 117 of Mr. Mayne's work, Edn. 8 has been cited. There Mr. Mayne says:

"In Western India it is stated that a widow under the age of puberty cannot adopt"

(The authority for that is *Steele*, p. 48 West and Buhler, p. 998.) The author continues:

"I suppose the reason for the difference is that there the adoption is the act of the widow, for which no authority, or consent, is required."

It seems to us that considering the importance of the act of adoption, it should be necessary that the adopting widow must have reached such an age of discretion that she must be able to realise the importance of her act, to make up her own mind as to the person she ought to adopt. There may be circumstances which will enable the Court to consider whether the widow has reached the age of discretion. That she has attained to puberty may be one circumstance but in this country not necessarily the only one. The actual age of the widow may be another test and probably the most important one. In this case I think both the tender age of the widow, and the fact that she has not reached the age of puberty, make it perfectly clear that she was not competent to know what she was doing. If we were to hold that such a person could adopt, we should open the door to all sorts of intrigue, so that the elder members of the family might be able to induce widows of tender age to make adoptions in the interests of those persons. If the adoption is invalid, as I think it is in this case from the commencement, then the mere fact that afterwards when the adopting mother grew older she raised no objec-

tion to the adoption, cannot in any way validate what was invalid ab initio. Therefore, I agree with the opinion which has been expressed by the lower Courts, and think that the appeal should be dismissed with costs.

Since this judgment was delivered, my attention has been drawn to the case of *Basappa v. Shidramappa* (1) and the cases therein cited, which are in accord with the conclusion at which we arrived.

Heaton, J.—I am of the same opinion. In our Courts we deal with adoptions, not as matters of religion, but as they affect property. If an adoption were a matter of religion and nothing more, it may be that a child would be capable of performing the adoption validly as soon as she was big enough and strong enough to take the adopted child in her lap. But if we come to look upon adoptions, as we do, not merely as matters of religion, but as matters affecting property, then we must consider, as my Lord the Chief Justice has said, whether a person making an adoption is capable of volition of his or her own. Certainly no ordinary child of twelve years of age is capable of volition of the kind here required, unless he or she is a very exceptional person. There is nothing in this case to suggest that the young girl involved possessed such exceptional powers as that. I think, therefore, that the appeal must be dismissed.

G.P./R.K. *Appeal dismissed.*

(1) [1919] 43 Bom. 481=50 I. C. 736.

A. I. R. 1920 Bombay 355

MACLEOD, C. J. AND HEATON, J.
Bai Parvati—Plaintiff—Appellant.

v.

Dayabhai Manchharam and others—
Defendants—Respondents.

Second Appeal No. 804 of 1917, Decided on 12th November 1919, from decision of Joint First Class Sub-Judge, Surat, in Appeal No. 8 of 1915.

Hindu Law—Gift—Gift by widow and one daughter to son of another daughter—Gift held valid as regards widow's life interest but invalid as regards chance of reversion of daughter which cannot be transferred—Transfer of Property Act (4 of 1882), S. 6.

A Hindu widow and one of her daughters gifted certain properties to the sons of another daughter, purporting to convey by the widow as the life-tenant and by the daughter as the next reversioner. On the death of the widow, the daughter brought the present suit to recover the property from the donees on the ground that as against her the gift was invalid, as it conveyed

her chance of surviving her mother and succeeding to the property as the reversioner:

Held: that the gift was only good as regards the life-interest of the widow, as the Hindu law does not recognize the transfer of a chance of succeeding to a reversion, and that consequently the gift as regards the daughter was invalid.

[P 356 C 2]

B. J. Desai and T. A. Gandhi--for Appellant.

Jayakar and G. N. Thakor--for Respondents.

Macleod, C. J.—One Kashidas died in 1868 leaving a widow Gulab, a son Ghelabhai and two daughters Parvati and Jekore. His property descended to his son Ghelabhai. On Ghelabhai's death his mother Gulab became his heir. Gulab died in 1911. In 1891 Gulab and Parvati, one of the daughters, gifted two properties to defendants 1 to 4, who were the minor sons of the deceased daughter Jekore, purporting to convey those properties by Gulab as the life-tenant and by Parvati as the next reversioner. After the death of Gulab, Parvati filed this suit to recover the property from the donees under the gift of 1891, on the ground that the deed as against her was invalid as it conveyed her chance of surviving Gulab and succeeding therefore to the property as reversioner.

The trial Court dismissed the suit, and the appeal against the order of dismissal was also dismissed by the First Class Subordinate Judge. A good deal of confusion often arises in cases of this nature owing to the facts of the case not being properly held in view in arguing the points of law which may arise. There may have been circumstances in the case which would have enabled Gulab and Parvati together to give a good title to a third party of the property in question. It all depended on the manner in which the transaction was effected. But keeping strictly to the facts in this case at the time of the deed of gift, Gulab was the life-tenant, Parvati had the chance of succeeding to the property on Gulab's death if she happened to survive Gulab. In these circumstances the document of 1891 was executed. Gulab conveys her life-interest; Parvati conveys her chance of succeeding after the death of Gulab. If those interests together made up what may be called a fee in the property donated, then no doubt it would be a good transaction. But it cannot be said, however one looks at

the case, that the whole of the fee was conveyed to defendants 1 to 4 by that document. It is not a case of an alienation by a widow of property of which she is the life-tenant with the consent of the next reversioner. From such consent it can be presumed that the alienation by the widow was for a necessary purpose. The onus would lie upon the person disputing the alienation to show that it was not for necessary purposes. Again, the widow might have relinquished the whole of her life-interest into the hands of the next reversioner, in which case the next reversioner would then become solely entitled to the property. It cannot be said here that Gulab relinquished her interest in the properties gifted to defendants 1 to 4 by Parvati before the gift was made. Therefore we must consider only the facts as they occurred in this case. What defendants 1 to 4 got under the deed of gift was the life-interest of Gulab *plus* the chance of Parvati succeeding to the property on the death of Gulab. These were two distinct interests, and it cannot be contended that under the gift defendants 1 to 4 were solely entitled to the whole of the interests in the property. In my opinion the gift was only good as regards the life-interest of Gulab.

It has been urged upon us that the father of defendants 1 to 4 gave consideration for the gift by maintaining Gulab. Although that does not seem to me to affect the appellant's argument in any way, there can be no hardship, at any rate as regards defendants 1 to 4, if their father maintained Gulab during the time he was in possession of the property during Gulab's lifetime.

So then the transfer by Parvati in the deed of gift of 1891 of her chance of succeeding to the reversion cannot be sustained. It is certainly bad under S. 6 T. P. Act, and it would lie upon the respondents to show that S. 6 does not apply because by the provisions of Hindu law such a transfer is recognized as good. But there is no direct authority on the point under Hindu law, though there are dicta in several cases which have been cited which clearly show that it is the opinion not only of Judges in India, but also of their Lordships of the Privy Council, that Hindu law does not recognize the transfer of *spes successionis*.

Therefore the respondents have not satisfied us that this transfer by Parvati of her chance of succession is valid. If then it is invalid there is an end of the case, unless it can be argued that Parvati is prevented by some rule of law from setting up the contention that the deed as regards her interest is invalid. I know of no rule of law which can prevent a party from asking the Court to hold that a particular transaction, which as a matter of fact is invalid, should be held to be invalid.

There can be no estoppel on a point of law. The fact is that it is the duty of the Court, as soon as the invalidity of a transfer is pointed out, if it is satisfied that there is such an invalidity, to set aside the document. Therefore in my opinion the deed of gift to defendants 1 to 4 was good only as regards the life-interest of Gulab, and was bad as regards the transfer of a chance which Parvati had at that time to succeed to the reversion. Therefore the appeal succeeds and decree of the lower appellate Court must be set aside. There must be a decree in favour of the plaintiff for possession of the property with mesne profits from the date of the suit and costs throughout. Under O. 33, R. 10, the plaintiff to pay court-fees.

G.P./R.K.

Decree set aside.

A. I. R. 1920 Bombay 357

MACLEOD, C. J. AND HEATON, J.

Damodar Krishna Kulkarni and another—Plaintiffs—Appellants.

v.

Collector of Nasik—Defendant—Respondent.

First Appeals Nos. 69 to 77, 79 to 82 and 120 to 124 of 1918, Decided on 12th September 1919, from decision of Dist. Judge, Nasik, in Suits Nos. 1 to 5, 10, 14, 19, 20, 21 to 27 of 1917 and 1 to 5 of 1918.

Bombay Revenue Jurisdiction Act (10 of 1876), S. 4 (a)—Suit for declaration of hereditary title as Vatandar Kulkarni and for injunction to restrain interference in enjoyment is barred.

A suit against the Secretary of State for a declaration that the plaintiffs are the hereditary vatandar kulkarnis of a village and are entitled to the vahivat thereof, and for an injunction restraining the defendant from interfering with the enjoyment thereof by the plaintiffs is barred by the provisions of S. 4 (a), Bombay Revenue Jurisdiction Act.

[P 357 O 2]

Patwardhan and Y. N. Nadkarni for B. V. Desai—for Appellants.

Dhurandhar and S. S. Patkar—for Respondent.

Judgment.—This suit was filed by the plaintiffs alleging that they were the hereditary Kulkarni Vatandars, plaintiff 1 holding eight annas share and plaintiff 2 holding two-annas eight pies share in the villages of Pimpalgaon Baswant and Dehed of the Nasik District; that the Vahivat of the said Vatan had been carried on in their family hereditarily for a long time since the time of their ancestors; hence the plaintiffs had the right of carrying on the Vahivat; but notwithstanding this the Revenue Officers of the defendant, without taking into consideration plaintiffs' legal rights and after using undue influence and coercion had compelled the plaintiffs, to give consent to a commutation of their Vatan against the plaintiffs' will; that according to the provisions of the Vatan Act no such transaction could take place; any such act, if done, was illegal, and therefore the plaintiffs were not bound by the said consent nor were their rights affected thereby. The plaintiffs prayed that they be declared hereditary Vatandar Kulkarnis of the villages of Pimpalgaon Baswant and Dehed and that it might be declared that the plaintiffs were entitled to be Vatandars and entitled to the Vahivat of the said Vatan hereditarily as before; and for an injunction restraining the defendant from interfering with the Vahivat and enjoyment of the Vatan by the plaintiffs.

Notice had been given under S. 80, Civil P. C., to the defendant. The period of the notice expired on 30th September 1917. Therefore the cause of action arose on 30th September 1917, when the period of notice expired.

The plaint was rejected by the District Judge on the ground that the suit was barred under S. 4 (a), Bombay Revenue Jurisdiction Act, 1876, and on reading the prayers of the plaint, it would be perfectly clear that the suit did come within S. 4 (a), Bombay Revenue Jurisdiction Act. But it has been represented to us in first appeal that the plaintiffs were really claiming that the arrangement between them and the Revenue Officers should be set aside on the ground of undue influence and coercion. It was pointed out to the appellants' Counsel that there was no

prayer in the plaint asking to set aside the agreement, and so long as the agreement stood, it would be impossible for the plaintiffs to obtain the declaration they ask for in paras. (a) and (b) of the prayers. It would not be possible to amend their plaint, because the plaint must correspond to the notice given under S. 80, Civil P.C., the object of that notice being that the Secretary of State may have knowledge of the claim made against him.

It was admitted during the argument on other companion appeals that the pleadings were somewhat different, and that the agreement arrived at between the Government and the Kulkarnis is dated 7th July 1914. Whether the period of limitation is one year under Art. 14, or three years under Art. 91, it was quite clear that if the plaintiffs had sued to set aside the agreement, the suit would have been barred by limitation unless some plea had been raised in the plaint to avoid the bar. As regards this appeal and the companion appeals in which the plaintiffs pray merely for a declaration that they are hereditary Vatandar Kulkarnis, and that they were entitled to be Vatandars and entitled to the Vahivat of the said Vatan hereditarily as before we are of opinion that the District Judge was right in rejecting the plaint. The appeals must be dismissed with costs.

In First Appeal No. 75 of 1918, Suit No. 3 of 1917, it appears from the notice given to the defendant, and from the plaint, that the agreement which the plaintiffs complain of was not made by the plaintiffs but by the plaintiffs' grandfather. They merely state in the plaint that they do not agree with the terms but they are not able to allege that undue influence or coercion was employed in order to get their grandfather to sign the agreement. In any event they would be suing to set aside an order which was made on the agreement made by their grandfather and it would not be open to them to set aside the agreement. Therefore the suit would come within S. 4(a), Bombay Revenue Jurisdiction Act. Even if that Act did not apply the suit again would be barred by limitation.

First Appeals Nos. 76 and 77 stand on a different footing. In both these cases the agreements which the plaintiffs

object to were made between the plaintiffs themselves and the Government and it was alleged that there was misrepresentation, undue influence and coercion and that was alleged in the notice served under S. 80, Civil P. C., on the defendant. Apart from any other questions these plaints do not observe the rule of pleading laid down in O. 6, R. 4, which enacts that

"in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

That was enacted in order to prevent parties seeking to rely in their plaint on very vague allegations of misrepresentation, fraud, breach of trust, wilful default or undue influence. Then again it has to be admitted by the plaintiffs that the agreement which they seek to set aside was made on 7th July 1914, whereas the plaints were presented on 30th September 1917. Therefore it would be no use for us to set aside the order of the District Judge rejecting the plaint on the ground that the suit was barred under S. 4 (a), Bombay Revenue Jurisdiction Act, 1876, as if the plaints were again presented, they would have to be rejected on the ground that on the facts set up in the pleadings and on the face of the plaints they were presented beyond the time prescribed by the Indian Limitation Act. All the appeals will therefore be dismissed with costs.

G.P./R.K.

Appeals dismissed.

A. I. R. 1920 Bombay 358

MARTEN, J.

Bai Monghibai—Petitioner.

v.

Bai Rambhalaxmi—Opponent.

Testamentary Suit No. 9 of 1920, Decided on 2nd September 1920.

Practice — Jurisdiction in testamentary suit—Terms of compromise partly not within scope of jurisdiction—Proper procedure to be followed stated.

Where in a testamentary suit the parties agree on certain terms, some of which do not fall within the testamentary jurisdiction of the Court, the proper procedure is to put all the terms in a schedule and to carry them out in the body of the order so far as the Court has jurisdiction. Those terms which do not fall within the testamentary jurisdiction of the Court can rest on agreement and, if necessary, they can be enforced in a suit on the Original Side. [P 359 C 1,2]

P. B. Vachha—for Petitioner.

R. G. Munsiff—for Opponent.

Judgment.—In this testamentary suit the parties have agreed on certain terms, and, as frequently happens in testamentary suits, some of the terms are such as possibly do not fall strictly within the testamentary jurisdiction. Some undoubtedly do; but it is possible that as regards some of the others, they could more strictly be carried out in the exercise of the original jurisdiction of this Court. The difference between these two jurisdictions corresponds very much to what would be the difference in England between the Probate jurisdiction and the Chancery jurisdiction.

Quite recently in this Court in the case of *Samuel, In re* (1) a similar point arose; but there the terms, counsel agreed on, were even more of what I may call a Chancery nature. In effect, the parties there wanted certain directions given to the administrator as to how the estate should be dealt with and how it was to be divided between certain beneficiaries. When the order in that latter case came before the Registrar, he very properly drew my attention to the standing direction of Sir Lawrence Jenkins given on 22nd August 1901. It is contained in a letter written by the then Registrar to the Attorneys in a particular case; and it says as follows:

"With reference to your precept to draw up the consent decree in the above suit passed on the 14th instant, I beg to inform you that I cannot draw up the decree as specified in the terms save and except as mentioned in Cls. 6 and 7 thereof. The Honourable the Chief Justice is of opinion that the Court exercising testamentary and intestate jurisdiction can deal with the questions of grant of Probate and Letters of Administration only and nothing more; and I have been directed to see that the consent decree providing for more than that should not be drawn up."

Now, I think I have been taking testamentary matters now for a considerable time, I suppose some two years, and this particular direction was not previously brought to my attention, although of course from practice in England I was quite familiar with the distinction drawn between the jurisdiction of the Probate Court and the jurisdiction of the Chancery Court. The note I have made in dealing with this standing direction is as follows:

(1) Testamentary Suit No. 8 of 1920.

"The Testamentary Registrar is quite right in drawing attention to this direction of Sir Lawrence Jenkins, but it must not be pushed too far. The English Probate Court's jurisdiction is also confined to Probate and Administration and it has not even got the Indian jurisdiction given by S. 90, Probate and Administration Act. Yet, it is a matter of common occurrence for Probate suits in England to be settled on terms that embody distribution or administration of the estate in a particular way and which are by no means confined to the mere question whether Probate or Letters of Administration shall issue and if so to whom. If such terms are arrived at they must be all shown in the decree either expressly or by reference. Otherwise, the decree is misleading. It may be that the English Probate Court cannot itself carry out all the terms, e. g., an application to the Chancery Division under the Settled Land Acts or in Lunacy may be necessary to effectuate the terms. But that does not prevent the terms being set out. In the present case I think I have jurisdiction to order the sale asked for in para. 4 and to direct the payment to the Accountant-General asked for by para. 7. The issue was as to the person to be appointed administrator and these terms are really safeguards attached to her appointment. I was not compelled to appoint the widow (see Succession Act, S. 202 and Ss. 225 and 224)."

"Paragraphs 5, 6 and 7 are however more appropriate to an administration suit, and a decree could not be made here for administration simpliciter. That would be for the ordinary jurisdiction on the Original Side."

"I think the best plan is to put the terms in a schedule and for the body of the order to carry them out so far as we have jurisdiction. The doubtful paras. 5 to 7 can rest on agreement and, if necessary, they can be enforced in a suit on the Original Side. The liberty to apply to the Probate Court is added as possibly it may be useful. I have accordingly settled the minutes on these lines."

Accordingly, in that case I settled the minutes as there stated, and eventually passed a decree accordingly.

I propose to follow that direction in the present case. The consent terms will be embodied in a schedule, and the body of the order will give directions, so far as I properly can, sitting as a Judge of the Probate Court. I think those directions which I may properly give will be that the bonds when purchased in the name of the Accountant-General are to be held by the Accountant-General subject to the direction given in the consent terms, and that he is to remit the interest as directed in para. 3 and may vary the investment as directed in para. 4. I think para. 5 may be carried out by a formal admission in the body of the decree. As to para. 6, I do not see any objection to giving directions as to what is to be done with these securities on the

death of the defendant nor to the consent contained in para 7.

I accordingly direct the decree to be on the lines I have indicated.

The minutes to be shown to me, and I will certify the consent terms to be for the benefit of the minors.

I have stated all this because Counsels agree with me in thinking that it is convenient for the members of the Bar practising in this Court, and also for the Attorneys, to know definitely what I consider the practice of this Court ought to be on the points I have mentioned.

G.P./R.K.

Order accordingly.

A. I. R. 1920 Bombay 360

MACLEOD, C. J. AND HAYWARD, J.

Ekoba Govindshet Vani — Plaintiff — Appellant.

v.

Dayaram Narayan — Defendant — Respondent.

Second Appeal No. 475 of 1917, Decided on 5th September 1919, from decision of Asst. Judge, Khandesh, in Appeal No. 212 of 1916.

Evidence Act (1 of 1872), S. 116—Tenant must surrender tenancy and possession before being entitled to deny landlord's title.

Section 116 rests on the principle that a tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord. [P 360 C 1]

A tenant who wishes to dispute his landlord's title, must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. A tenant cannot be allowed to hold over and remain in possession, and then use that possession as a lever to support a case in which he denies the landlord's title. [P 361 C 1]

Jayakar and W. B. Pradhan—for Appellant.

P. B. Shingne—for Respondent.

Macleod, C. J.—The plaintiff sued to recover possession of the suit property as owner with mesne profits at Rs. 60 a year and costs of the suit alleging that the suit property originally belonged to one Vithoba valad Maharoo, his uncle. Vithu died in 1882, leaving a widow Dagoobai. In 1903 she gifted the plaint property to the defendant. The widow died in 1906 and thereafter the plaintiff executed a rent-note in favour of the defendant. The defendant afterwards brought a suit for possession under the rent note and a decree was passed. But it is admitted for the purposes of this suit that the defendant did not get possession under

his decree and the property is now in the possession of the plaintiff's son. Both Courts have held that in the circumstances of the case the plaintiff is estopped from bringing this suit. There can be no doubt that as long as the tenancy continued under the rent-note passed by the plaintiff to the defendant, the plaintiff was debarred from disputing the defendant's title. But it has been argued before us for the appellant that that bar was removed, as soon as a decree was passed for possession in favour of the defendant. If that argument were correct, it would follow that a party who remains in possession of the property rented could bring a suit disputing his landlord's title, in spite of the fact that the landlord had not got possession after the period of the tenancy had come to an end. In *Mt. Bilas Kunwar v. Desraj Ranjit Singh* (1) it was laid down by their Lordships of the Privy Council that S. 116, Evidence Act rests on the principle, well established by many English cases, that a tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored possession by surrender to his landlord. That decision is sufficient to destroy the argument which has been raised before us by the appellant's Counsel.

Now that the position of the plaintiff has been realised, an offer has been made that he should surrender possession to the defendant, and that then the case should be remanded to the lower Court for trial of the issue whether the plaintiff had given his consent to the alienation by the widow. That suggestion might have been adopted if the defendant had consented to the course proposed, but without that consent we do not think we should allow that indulgence to the plaintiff after four years, and after having the case tried in three Courts. The finding is that he cannot succeed on the plaint as framed. He offered to do what he ought to have done before the suit was filed, that is to say, give possession to the defendant, the possession which was decreed in the defendant's suit. If we allowed that indulgence we think that would open the door to similar action in other cases. It is necessary to lay down perfectly clearly that a

(1) A. I. R. 1915 P. C. 96=37 All. 557=42 I. A. 202=30 I. C. 299 (P. C.).

tenant who wishes to dispute his landlord's title, must not only see that the tenancy has come to an end, but that the possession which was in him as a tenant has been surrendered. We cannot allow a tenant to hold over and remain in possession and then use that possession as a lever to support a case in which he denies the landlord's title. I think the appeal must be dismissed with costs.

Heaton, J.—I agree. The only reason why I add a few words of my own is that it may be thought that we are going outside the meaning of the words of S. 116, Evidence Act. There is no doubt in this case that the plaintiff became a tenant of the defendant, and was placed in possession of the premises leased by the landlord. That is found as a fact. At a later period the tenant denied the landlord's title. The landlord was compelled to bring a suit against him and he obtained a decree for possession. It may be said therefore that the tenancy then came to an end, and that S. 116 as its words describe, only applies during the continuance of the tenancy. However we have a very clearly expressed opinion of their Lordships of the Privy Council in the case of *Mt. Bilas Kunwar v. Desraj Ranjit Singh* (1). There can be no question but that we must accept and follow the principle laid down by their Lordships of the Privy Council. It matters very little whether we regard that judgment as giving an extended meaning to the words "during the continuance of the tenancy" used in S. 116, Evidence Act, or whether we merely regard the decision of their Lordships as an application of a principle somewhat wider than that which is given expression to, or limited by, the precise words of S. 116. In either event we are bound to do what we are doing. If the Privy Council have extended the meaning of certain words in that section, we must do the same. If on the other hand they have merely applied a principle which has a wider application than is given to it by the mere words of S. 116, again we must do the same. If I am permitted a preference, I should say that the Privy Council did not extend the meaning of the words, but acted on a principle that is perfectly sound and is well-recognised in equity. We cannot properly depart from that principle, although it has received a somewhat restricted applica-

tion in S. 116, Evidence Act. I therefore agree that the appeal must be dismissed with costs.

G.P./R.K

Appeal dismissed.

A. I. R. 1920 Bombay 361

MACLEOD, C. J. AND HEATON, J.

Martand Trimbak Gadre and others—
Decree-holders—Appellants.

v.

*Daya Appaji Phatak—*Judgment-debtor—Respondent.

Second Appeal No. 47 of 1918, Decided on 25th September 1919, from decision of Dist. Judge, Poona, in Appeal No. 9 of 1915.

Civil P. C. (5 of 1908), O. 21, R. 72—Collector executing decree can grant permission to bid, but cannot allow decretal amount being made set off—That power is reserved to Court.

Where a decree is transferred to a Collector for execution, he has power to grant express permission to the holder of the decree to bid for or purchase the property sold in execution, but he has no power to allow the decree-holder to set off the decretal amount against the purchase-money. Permission to allow such set off can only be granted by the Court which transferred the decree for execution. [P 362 O 1]

P. V. Nijasure—for Appellants.

Macleod, C. J.—In this case the decree was transferred to the Collector for execution. Under R. 91 (16) (1) at p. 105 of the Manual of Circulars regarding the powers of the Collector, the Collector can grant express permission to the holder of a decree, in execution of which property is sold, to bid for or purchase the property. Provided that the Collector or other officer aforesaid to whom an application for such permission may be made shall not grant such permission, unless the decree-holder inter alia agrees that if the decree-holder or any one on his behalf becomes the purchaser, the purchase-money shall be paid to the Collector or other officer executing the decree.

The Collector therefore has no power to allow a decree-holder to set off the decretal amount against the purchase money. The question before us is whether the decree-holder having received from the Collector permission to bid, and having been declared to be the highest bidder, can apply to the Court for permission to set off the decretal amount. If the sale is held in execution under O. 21 of the Code, under R. 72 (1), "where a decree-holder purchases with such permission, the purchase-money and the amount

due on the decree may, subject to the provisions of S. 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly."

It would naturally follow from the fact that a decree-holder obtains permission to bid, that he should be entitled to set off the decretal amount against the purchase-money, provided that there are no other attaching creditors entitled to rateable distribution under S. 73 of the Code, and it appears to me that power to give permission to set off was not granted to the Collector because the Collector would not be in a position to know what other attachments there were against the property sold in execution, but I see no reason why a decree-holder, after getting permission from the Collector to bid, should not apply to the Court for an order entitling him to a set off. It would naturally follow from a permission to bid granted by the Court itself. We have been referred to a decision of a Bench of this Court in *Shriniwas Appacharya v. Jagadevappa* (1). In that case the defendant who had applied to execute a decree, and whose decree had been transferred to the Collector for execution, applied to the Court in the first place for leave to bid at the sale, and then for permission to set off the price against the decretal debt. It was held that the Court had no power to entertain the application for leave to bid, nor could it permit a set off. It is quite clear that the Court had no power once a decree had been transferred to the Collector for execution, to entertain an application by the decree-holder for leave to bid.

But I do not think that the point that arises in this case was before the Court in that case, and although there was an expression of opinion on the part of the Court that an application to set off could not be entertained, that must be read in connexion with the application which was then made, which was primarily one for permission to bid. It is certainly unreasonable to suppose that a decree-holder who has obtained permission to bid from the Collector, should not be able to obtain from the proper authority the right to set off which is the natural consequence of having received permission to bid. The reason why he must apply to the Court is clear. The Court

which transferred the decree for execution would be the Court which would know what other applications for attachment had been made and it would therefore be the only authority to know whether the decree-holder could set off the whole of the decretal amount against his purchase-money, or what amount he should pay into Court in order that there might be rateable distribution in favour of himself and other attaching creditors. If the Court had not this authority to grant leave to set off after the decree has been transferred to the Collector for execution, it follows that a successful decree-holder at the sale would have to pay to the Collector the whole of the purchase-money and might then have to wait a very considerable time before he got back the money again to which he was entitled under his decree. In my opinion therefore this appeal should be allowed, and an order made giving the decree-holder permission to set off the decretal amount against the purchase-money, as it is not suggested that there are any attaching creditors who have executed their decrees against this particular property which has been sold.

It follows that the agreement the applicant had to make with the Collector to pay in the whole of the purchase-money becomes null and void to the extent of the set off. The appeal is allowed with costs throughout.

Heaton, J.—I concur. There can, I think, be no doubt that when leave is given to a decree-holder to bid at an auction sale, a necessary consequence is that he shall ordinarily be permitted to set off the amount due to him under his decree against the amount he is required to pay, if he is the highest bidder at the auction. That is apparent from R. 72, O. 21 of the Code and as my Lord the Chief Justice has pointed out it has convenience to recommend it, and great inconvenience would result from any other course. As the power to allow a decree-holder to bid at an auction sale is transferred to the Collector in cases of the kind we are considering, I should infer, if there were nothing to the contrary, that the Collector also had power to allow a set off, because by allowing it he would be merely exercising what would be an ordinary and reasonable ancillary power in the conduct of the business entrusted to him. There is however speci-

(1) [1918] 42 Bom. 621=46 I. C. 653.

fic provision in the rules which implicitly forbids the Collector to allow a set off. That is Cl. (16) (c), R. 91, of the rules which appear on p. 106 of the Manual of Circulars of this Court. Now is that limitation on the Collector's powers intended to prevent a set off in such cases, or is it merely intended to provide that the Court, and not the Collector, shall allow the set off? It seems to me that this clause is not intended to prohibit a set off altogether because to do so is unnecessary.

It is inconvenient, and it is contrary to the general purpose of the law in cases of this kind. But the Collector is not the person to allow the set off, for the simple but very sufficient reason that in many cases he would not be in a position to know whether there were other attaching creditors who had a claim to rateable distribution. That information is in the possession of the Court, and I conclude that as that information is in the possession of the Court, it is intended that the Court, and not the Collector, should give leave to set off. It is true that the rules might have made this clearer. It is also true that in the case of *Shriniwas Appacharya v. Jagadevappa* (1) there is an expression of opinion to the contrary. But that expression of opinion was not necessary for the purpose of the decision arrived at, nor in that case was any mention made of what seems to us to be the dominating consideration in the matter, and that is that by reason of the possibility of rateable distribution the Collector is not, whilst the Court is, in a position to decide whether a set off should be allowed or not. Therefore I agree in the order proposed.

G.P./R.K.

*Appeal allowed.***A. I. R. 1920 Bombay 363 (1)**

MACLEOD, C. J. AND HEATON, J.
Annaya Madvalaya—Appellant.

v.

Sidaya Murgayya Salgar—Respondent.

Second Appeal No. 27 of 1919, Decided on 1st February 1920, from decision of Dist. Judge, Sholapur, in Appeal No. 69 of 1917.

• **Hindu Law—Succession—Paternal uncle's grandson is nearer than sister's son.**

Under Hindu law a paternal uncle's grandson is a gotraja sapinda, and is therefore a nearer heir than a sister's son, who is only a bandhu.

[P 363 C 2]

B. G. Rao—for Appellant.

G. P. Murdeshwar—for Respondent.

Judgment.—The only question in this appeal is whether the plaintiff, who is the sister's son of Virbhadrappa, is a nearer heir than the defendant, who is great grandson of Virbhadrappa's paternal uncle. When the succession fell in at the death of Virbhadrappa's mother Nilawa, the defendant's father was alive, and there can be no doubt that the defendant's father, who was a gotraja sapinda, was the nearer heir than the sister's son who would only rank as a bandhu. The appeal is dismissed with costs.

G.P./R.K.

*Appeal dismissed.***A. I. R. 1920 Bombay 363 (2)**

MARTEN, J.

Weld & Co.—Plaintiffs.

v.

Sher Ahmed Ekbal Ahmed—Defendant.
and

(*Haji*) *Karim Elahi*—3rd Party.

Ordinary Original Civil Suit No. 1170 of 1916, Decided on 19th June 1919.

Letters Patent (Bombay), Cl. 12 — Third party proceedings are covered by Cl. 12 — Leave must be obtained when cause of action is partly outside of jurisdiction — Leave cannot be presumed for order to issue third party notice.

Inasmuch as third party proceedings come within the description "suits of every other description" in Cl. 12, the leave of that Court must be obtained to proceed therein when part of the cause of action arises outside the jurisdiction of that Court and the third party resides outside the jurisdiction. Such leave cannot be inferred from the fact that leave was obtained to issue the third party notice, as that does not necessarily imply that the question was judicially considered.

Setalvad—for Defendant.

Judgment.—This preliminary objection raises a two-fold point of jurisdiction, viz., (1) whether in this case, the whole cause of action arose out of the jurisdiction and therefore this Court has no power to hear third party notice at all; and (2) if part of the cause of action arose within the jurisdiction, then, whether express leave was not necessary under Cl. 12, Letters Patent, before the third party notice could be served.

I am now on the third party notice, and have, as between plaintiffs and defendant already given a decree in favour of the plaintiffs. The present issue, viz.,

No. 1, is between the defendant and the third party.

On the first point, the substance of the suit relates to certain cotton contracts on which, as I have said, I have found the defendant is liable to the plaintiffs. As between the defendant and the third party the defendant's case depends on a right of indemnity and substantially it is based on an express agreement of 21st May 1916: Ex. 4. The effect of that agreement was that the third party was to take over the cotton contracts then outstanding between the plaintiffs and the defendant, and that the defendant was to carry out certain instructions of the third party in relation thereto, and that the third party thenceforth was to be responsible pecuniarily on these contracts. The third party says that the true relation was not that of principal and agent but that of vendor and purchaser, or assignor and assignee. Even assuming in his favour, without deciding the point that that is the true view, still it is clear that the contract, Ex. 4, contemplated the defendant carrying out its terms by performing certain acts in Bombay. In other words, if he came to sue the third party on this contract as he has now done, he would have to prove certain acts of his which either took place in Bombay, or which, by means of telegrams, resulted in acts in Bombay. What I refer to are the cotton transactions which the plaintiffs carried out in Bombay as the result of instructions given by the defendant. It seems to me that, on that ground alone, a part of the cause of action has arisen in Bombay, because, to sue on the contract, it would be necessary for the defendant to prove certain operations carried out in Bombay by his instructions.

Mr. Setalvad, for the defendants, has taken another point, and that also seems to me, as at present advised, to be well founded. He says, as far as the third party notice is concerned, a part of the cause of action is this very suit in Bombay, because the validity of a third party notice depends on two things, viz., first a hostile suit in Court, and secondly, a right to indemnity. The hostile suit he relies on is this very suit filed in Bombay. It seems to me therefore that the third party's objection on the ground that the subject-matter of this third

party notice arose wholly out of jurisdiction is unfounded.

Now, I come to the second point, which has given me rather more trouble, and that is, whether assuming that part of the cause of action arose out of the jurisdiction, then whether leave to serve this third party notice ought not to have been obtained under Cl. 12, Letters Patent. In considering that, one may compare three classes of proceedings, viz., (1) an ordinary suit, where you add a defendant, (2) a suit where there is a counter claim bringing in a new party, and (3) a third party notice. Now, as regards Class No. 1, it seems clear that, under the Bombay High Court practice, you must obtain leave under Cl. 12, Letters Patent, to sue the new defendant although you may have obtained leave, under Cl. 12 to bring the suit against the original defendant. Authority for that proposition will be found in *Rampartab Samrathrai v. Foolibai* (1). Similarly, as regards Class 2, if you bring a counter claim against the plaintiff and bring in as a defendant to that counter-claim a new party, there, again, you must get leave under Cl. 12, Letters Patent, because, as has very properly been admitted by Mr. Setalvad, under our Bombay rules (R. 118) a counter-claim has the same effect as a cross-suit. Therefore if leave would be necessary for an original suit, so also is it for a cross-suit. I am assuming, of course, cases where part of the cause of action is outside the jurisdiction and where the defendants live out of the jurisdiction.

Now, I come to the question of the third party notice, Class 3. This is, in some respects, a combination of Class 1 and Class 2 and for this reason. The usual order provides that the third party shall be at liberty to appear at the trial of the action and take such part therein as he may be advised, and that the third party notice is to be tried at the same time as the original suit but after it. Now, what is the effect of this order? The third party can appear at the trial and, subject to the Judge's directions, he can dispute the plaintiffs' claim. This he could not do if it was merely the case of a cross-suit, because, in that event, he would have no locus standi on the bearing of the original suit. The third party therefore resembles to some degree an

(1) [1896] 20 Bom. 767.

added defendant, although the plaintiff obtains no decree against him directly.

Then, when the third party notice is tried, it is in the nature of a cross-claim, namely, a claim brought by the defendant against the third party. Perhaps, to be quite accurate, a cross-suit should involve a claim against the plaintiff as well, but the analogy is near enough for my purpose. Therefore on principle, one would expect to find that it is as necessary to obtain leave for a third party notice as it would be if the third party was added as a defendant, or if a counter claim was brought against him as a new party.

Counsels have been unable to find any Indian authority on the point and they tell me that the third party procedure was introduced into this Court by Sir Lawrence Jenkins and that other High Courts have not yet adopted it. This may account for the lack of Indian authority.

As far as the English practice is concerned, it is quite clear from the decision of the Court of appeal in *McCheane v. Gyles* (2) that under the English practice the leave of the Court is necessary to serve third party notice out of the jurisdiction. Mr. Setalvad says this decision depends on the wording of the English Supreme Court Rules, one of which requires third party notices to be served like writs (as in our R. 127), and another of which requires leave for service of writs out of the jurisdiction. The latter rule, he says, is not to be found in our practice, for Cl. 12, Letters Patent, requires leave for certain suits and not for service of writs.

I do not however propose to discuss the differences—for there are differences—between the English rules as to pleadings and service out of the jurisdiction on the one hand and the Indian rules as to pleadings and leave under Cl. 12 on the other hand. Nor do I propose to rely on *McCheane v. Gyles* (2) as governing our practice. It is only useful by analogy. But I may just notice that our Bombay rules have so faithfully copied the English third party rules as to retain in R. 127 a reference to a statement of claim, a pleading unknown in our Courts. In fact, in England the writ precedes the

statement of claim. In India, the plaint precedes the writ.

The real point here is, I think, whether these third party proceedings come within the description "suits of every description" in Cl. 12, Letters Patent. Now, as to that, our third party rules will be found in Ch. 8, Rr. 127 to 133. It is to be observed that, under R. 128, if the third party does not appear on the third party notice, he is to be deemed to admit the validity of the decree obtained against the defendant, and his own liability to contribute or indemnify to the extent claimed in the third party notice. Then, under R. 129,

"where a third party makes default in entering an appearance in the suit in case the suit is tried and results in favour of the plaintiff, the Judge who tries the suit may, at or after the trial, pass such decree as the nature of the case may require for the defendant giving the notice against the third party."

Therefore, although we do not find in the third party rules, express words like those in R. 118 treating counter claim as cross-suits, and, although we have not got the same express provision in any of the Indian statutes, as is contained in the English Judicature Act 1873, S. 24 (iii), which expressly provides for third parties, still we have under the Bombay High Court Rules a form of procedure which is in substance a "suit" against the third party within the Letters Patent. Before the third party notice has been served on him, he is a free man and no Court can pass a decree against him. As a result of that third party notice he is in peril, and may, unless he takes certain steps, have a decree passed against him. It seems to me therefore that, substantially, the case falls within Cl. 12, Letters Patent, just as the case of an added defendant or of a counter claim against a new party does, and that leave under Cl. 12 is necessary.

This brings me to the next question whether leave was, in point of fact, obtained. Leave in the ordinary way was not obtained, that is to say, there is not the usual express endorsement: "Leave under Cl. 12, Letters Patent." But the Judge's order of 9th August 1917 giving leave to issue the third party notice was in the following form:

"I do order that the defendant be and he is hereby authorized to issue a third party notice against the said Karim Elahi Seth, notwithstanding the time to file his written statement having expired and to serve the same upon him by sending it by registered post to the address of

(2) [1902] 1 Ch. D. 297=71 L.J. Ch. 189=36 L.T. 1=50 W.R. 876.

the said Karim Elahi Seth at Mohulla Dhalan, Peshawar City."

Here you get an express statement in the Judge's own order that the defendant is to be at liberty to serve the third party notice by sending it by registered post outside the jurisdiction.

It is, accordingly, argued that there was implied leave under Cl. 12. But, as I have already intimated, there are differences between Cl. 12 and the English rules as to service out of the jurisdiction, and to treat the two as the same may be misleading. Further, my attention has been drawn to the judgment of Candy, J., in *Rampartab Samrathrai v. Foolibai* (1), where there had been an order made by Farran, J., to add a party as a defendant. That party was out of the jurisdiction. Subsequently, at the trial, the point that no leave had been obtained, was raised, and it was answered by saying that as the Judge gave leave to add this party, it must be inferred that he gave leave also under Cl. 12. Candy, J., overruled that answer and said, at p. 774 :

"It cannot be inferred that leave was then allowed or granted. In *Jairam Narayan v. Atmaram Narayan* (3), West, J., was asked to draw a similar inference, because leave had been granted to the plaintiff to sue as a pauper; 'but such leave' (he said) 'does not by any means necessarily imply that this particular question was judicially considered.'"

I may add that the order of Farran, J., will be found in *Foolibai v. Rampartab Samrathrai* (4) and that the point as to jurisdiction does not appear to have been raised before him, but that on appeal it was evidently present to the mind of Sir Charles Sargent, having regard to what that learned Judge said on p. 468.

No doubt, there is a distinction on the facts of the present case, because Kajiji's order expressly mentions service out of the jurisdiction. In the view, however which I take, it is unnecessary to decide this point. I will leave it open for future decision if necessary. I will only add that, in my opinion, solicitors should be careful to get leave under Cl. 12 in express terms. If that had been done here, of course, the point would have been unarguable.

Assuming, then, for the purposes of this case (but without deciding the point) that the Judge's order of 9th August 1917 did not give the necessary leave

under Cl. 12, it still remains to be seen what was done on that third party notice. The order, as I have said, was made on 9th August, and on 7th September the usual summons for directions was taken out. In answer to that summons the third party filed an affidavit of 21st September 1917 and in para. 1 of that he said :

"I appear on this third party notice under protest and submit that this Honourable Court has no jurisdiction to try the question between the defendant and myself as raised by the defendant in his written statement and in his affidavit of 23rd July last"

and he went on to say :

"I submit the whole of the cause of action between the defendant and myself arose in Peshawar."

That point I have already dealt with. It is the first objection. This affidavit did not raise the second objection, namely, that if part of the cause of action arose in Bombay, leave under Cl. 12, Letters Patent, had not been applied for. That affidavit was answered by the defendant and the third party put in a further affidavit of 4th October 1917. Then, on the hearing of the summons, the Judge made his order of 5th October 1917 in which he ordered the summons for directions to be made absolute; that the third party do file his written statement within four weeks, and make and file his affidavit of documents, and be at liberty to appear at the trial of this action and take such part therein as he may be advised and be bound by the result of the trial, and that the question of the liability of the third party to indemnify the defendant be tried at the trial of this action but subsequent thereto, and he ordered the costs to be costs in the cause. That was the usual form of order.

There is not a word said there about reserving the right of the third party to raise the point of jurisdiction at the trial. I must, I think, on the facts and on this order, assume that the learned Judge decided the point of jurisdiction against the third party. There has been no appeal from that order and it was made as long ago as October 1917. If I was now to decide that this Court has no jurisdiction to hear the third party notice, I should in effect be hearing an appeal, and reversing, on appeal, the decision of Kajiji, J., which, of course, I have no jurisdiction to do. Further, when it comes to the

(3) [1879-80] 4 Bom. 482.

(4) [1893] 17 Bom. 466.

further point of embarrassment, which also was raised before Kajiji, J., and to the argument that in the exercise of my discretion I should decline to hear this third party notice and leave the defendant to a fresh suit, I think there, again, I really cannot enter into questions of that sort in view of the deliberate decision of the Chamber Judge made so long ago as October 1917. It will be noticed that in *McCheane v. Gyles* (2) the third party moved to set aside the notice and order and when the motion was refused an appeal was presented: see pp. 289-290.

I therefore think that in substance this question of jurisdiction is *res judicata*, having regard to the order of the Chamber Judge of 5th October 1917 and that, accordingly, the point of jurisdiction which has been raised at the trial failed.

I accordingly answer issue 1, viz., whether the Court has jurisdiction to try this suit between the defendant and the third party, in the affirmative, and direct the trial of the other issues on the third party notice to proceed.

G.P./R.K. *Answer accordingly.*

A. I. R. 1920 Bombay 367

SHAH AND HAYWARD, JJ.

In re *Sir Cowasjee Jehangir Ready Money*—Applicant.

Criminal Revn. Appln. No. 294 of 1919, Decided on 30th September 1919, from order of Chief Presy. Magistrate Bombay.

(a) Criminal P. C. (5 of 1898), S. 144 — Nuisance in existence for length of time—Case cannot be treated as urgent case.

Section 144 merely provides for temporary orders in urgent cases of nuisance or apprehended danger, and ought to be applied with due regard to its scheme and purpose. Where a nuisance complained of has existed for a great length of time, practically without any complaint, the case cannot be treated as an urgent case of nuisance or apprehended danger, and cannot be treated fairly and properly as being within the special purpose of the section.

[P 368 C 1]

(b) Criminal P. C. (5 of 1898), S. 144—Permanent injunction necessary for final settlement—Order under S. 144 cannot be withheld.

The fact that a dispute demands a permanent injunction for its final settlement, is no ground for withholding a temporary order. [P 369 C 2]

(c) Criminal P. C. (5 of 1898), S. 435 (3)—Revision is excluded in matters under S. 144.

Section 435 (3) expressly excludes the exercise of revisional powers in matters referred to in S. 144 therefore, the High Court has merely to

satisfy itself that the facts found fall within that section so as to give jurisdiction to the Magistrate. [P 367 C 2]

Setalvad with Payne & Co.—for Applicant.

S. S. Patkar, Government Pleader—for the Crown.

Shah, J.—This is an application for the revision of an order made by the Chief Presidency Magistrate under S. 144, Criminal P. C. The orders under S. 144 are not proceedings within the meaning of S. 435 of the Code as provided by sub-S. 3 of that section, and are excluded from the revisional powers of this Court. It is clear however that it is open to this Court to consider whether the order complained of is outside the scope of the section under which it purports to have been made. If it is within the scope of the section, the Court cannot revise the order on its merits, in other words, we are not concerned with the propriety of the order if it is within the scope of S. 144. If it is outside the scope of the section, it is liable to be set aside on the ground that the lower Court had no jurisdiction to make it. On this point it is enough to refer to the observations in *Pandurang Govind, In re* (1).

The question whether it is outside the scope of the section must be determined with reference to the facts, which are found by the lower Court or which are not in dispute, in each case. With a view to determine that question we have examined the broad facts of the case and heard arguments on both sides.

Section 144 occurs in Ch. 11 of the Code. This chapter relates to temporary orders in urgent cases of nuisance or apprehended danger, and the section applies to cases where immediate prevention or speedy remedy is desirable. Any Magistrate mentioned in the section may by written order direct any person to abstain from a certain act, if the Magistrate considers that such direction is likely to prevent or tends to prevent danger to human health or a disturbance of the public tranquillity. Sub-S. 5 shows that no order under the section shall remain in force for more than two months unless in certain cases the Local Government otherwise directs. I may mention here that I express no opinion whatever as to whether the Local Government can make any permanent

(1) [1901] 25 Bom. 179=2 Bom. L. R. 755.

order under this section. The section in terms relates to temporary orders, and as the question as to the extent of the powers of the Local Government under this clause has not been argued before us, and it is not necessary to express any opinion on the point, I refrain from doing so. But I am quite satisfied that so far as the Magistrates referred to in the section are concerned, the section merely provides for temporary orders in urgent cases of nuisance or apprehended danger and that it ought to be applied with due regard to its scheme and purpose. The scheme and the provisions of the section to my mind show that it is meant to provide for a temporary remedy to meet an emergency and that it applies to cases where the temporary orders in the nature of things would be appropriate and would afford a reasonably adequate relief under the circumstances of the case. Having regard to the circumstances of this case to which I have adverted and which have been found by the Trial Magistrate, it seems to me that this case cannot be properly treated as an urgent case of nuisance or apprehended danger, when we have regard to the fact that the nuisance complained of has existed for a great length of time practically without any complaint. The inadequacy of remedy is established by the fact that the order, which in terms purports to operate for two months, will leave the parties practically in the same position with reference to their rights and remedies as to the alleged nuisance when the period expires.

I do not desire to say anything which can in any way restrict the wide powers given to the Magistrate under the section and reduce the corresponding responsibility laid upon him by the legislature. But having regard to the exceptional nature of the powers, it is right that the scope and the purpose of the section must be duly borne in mind in applying it to the facts of a particular case. The present case, it seems to me, cannot be fairly and properly treated as being within the special purpose of S. 144 of the Code. On that ground it is liable to be set aside.

In view of the fact that it is a temporary order which will expire on the 20th of the next month, and that during that time the opponent, if so advised, will have an opportunity to file a suit

for the prevention of the nuisance complained of and to obtain any temporary relief in the suit, I have come to the conclusion that in spite of my opinion to the contrary I may with propriety acquiesce in the order proposed by my learned brother.

I accordingly agree that the rule may be discharged.

Having regard to the position of the parties and to the nature of the case, it is not inappropriate to express a hope that both the parties will act hereafter in a spirit of forbearance and with due regard to the rights and conveniences of their neighbours, and that no further action in connexion with the nuisance complained of may be necessary.

Hayward, J.—This is an application for revision of the order of the Chief Presidency Magistrate, directing the applicant to abstain from certain acts and to take certain order with property in his possession for two months in order to prevent a disturbance of the public tranquillity under S. 144, Criminal P. C.

It has been urged on behalf of the applicant that he was not the aggressor and that the proper procedure would have been to bind over the respondent to keep the peace. It has also been urged that it was improper to pass a temporary order of this nature for the settlement of a dispute demanding a permanent injunction. It was urged on these grounds that the order was passed without the jurisdiction conferred by S. 144, Criminal P. C.

The circumstances appear to me undoubtedly such as to create an emergency requiring an immediate order so as to prevent a disturbance of the public tranquillity. Deliberate provocation would seem to me no less reprehensible than deliberate breach of the peace. It was to deal with that deliberate provocation and to prevent a probable breach of the peace resulting that these particular proceedings were taken before the Magistrate and it is difficult, in my opinion, to say that they were not within the wide terms of the section, which are as follows :

“Where, in the opinion of a Chief Presidency Magistrate immediate prevention or speedy remedy is desirable, such Magistrate may, direct any person to abstain from a certain act or to take certain order with certain property in his possession. If such Magistrate considers that

such direction is likely to prevent annoyance or injury to any person lawfully employed, or danger to health or a disturbance of public tranquillity or an affray."

It is difficult to say, on the facts found, that immediate prevention or speedy remedy was not desirable or that the direction to abstain from the particular acts mentioned would not be likely to prevent annoyance to any person lawfully employed or prevent danger to health, or in view of what had actually happened that there was no likelihood of an affray or a disturbance of the public tranquillity. Nor, in my opinion, is it possible to hold that a temporary order ought not to be passed merely because the dispute demanded a permanent injunction for final settlement. There does not appear to be any such express limitation in the section. On the contrary it is provided in the last clause as follows :

"No order under this section shall remain in force for more than two months unless otherwise directed by the Local Government by notification in the Official Gazette."

It would appear therefore by the last clause that even a permanent order would not be illegal under S.144, Criminal P. C., if made in a particular manner by the Local Government.

We have, it must be remembered, to take the facts as they have been found. It is not open to us to enter into the merits of the quarrel sitting here in revision. We have to leave the matter entirely to the discretion of the Magistrate. The responsibility for preserving the public tranquillity has been laid wholly on the Chief Presidency Magistrate and the revisional powers of the High Court have been expressly excluded by the provisions of Cl. 3, S. 435, Criminal P. C. We have therefore merely to satisfy ourselves that the facts found fell within the section so as to give jurisdiction to the Magistrate, as pointed out in the case of *Pandurang Govind, In re* (1) by Sir Lawrence Jenkins. It has already been observed that the facts here found did, strictly speaking, fall within the very wide scope of the section and it would therefore be impossible for us, in my opinion, to hold that the order was passed without jurisdiction by the learned Chief Presidency Magistrate under S.144, Criminal P. C. The order ought therefore in my opinion, to stand and the rule

ought to be discharged, which has been issued by this Court.

I should like to add my entire concurrence with the last remark of my learned brother.

G.P./R.K.

Rule discharged.

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MACLEOD, C. J. AND HEATON, J.

Chandanmal Hambirmal Hundekari and another—Defendants—Appellants.

v.

Bhaskar Waman Deshpande—Plaintiff—Respondent.

Second Appeal No. 724 of 1918, Decided on 13th October 1919, from decision of Dist. Judge, Ahmednagar, in Appeal No. 19 of 1917.

Bombay Land Revenue Code (5 of 1879), S. 74—Whether rajinamah and kabuliyat form sale deed depends upon circumstances—Intention to transfer ownership is necessary.

The execution of a rajinamah and a kabuliyat does not, in the absence of evidence, or indications furnished by lapse of time and possession and so forth of an intention to transfer ownership completely take the place of a sale-deed. Each case, however, depends upon its own facts. [P 370 C 1, 2]

*D. C. Virkar—*for Appellants.

*A. G. Desai—*for Respondent.

Macleod, C. J.—The property in suit in 1884 belonged to one Chinkabai. She mortgaged it to the plaintiff's father in 1884. In 1894, she executed a rajinama in favour of her son Madhavrao, giving notice under S. 74, Bombay Land Revenue Code of 1879 that she had relinquished the occupancy of certain survey numbers mentioned therein, and asked for the necessary mutations of names to be made in the records. At the same time Madhavrao executed a kabuliyat addressed to the Mamlatdar, and the properties were transferred in the Government records to the name of Madhavrao. In 1903 Madhavrao mortgaged to the defendant 1. The plaintiff brought a suit on his mortgage in 1910 and got a decree for sale in 1911. He purchased in 1915. Defendant 1 got a consent decree against Madhavrao in 1908 and purchased under that decree in 1912. The evidence adduced at the trial convinced the trial Judge that the transfer of the property to the name of Madhavrao in 1894 was merely for the convenience of Chinkabai, and he found it was recognised between Madhavrao and Chin-

kabai that Madhavrao was merely managing the property for her. He finds on issue 3 as follows:

"I have, therefore, to find that Madhavrao never professed to be in possession and Vahivat as owner and that Chinkabai did not absolutely relinquish her proprietary right in favour of Madhavrao by the change of Khata to his name. The purpose of the change of Khata seems to be to facilitate the management of the property by Madhavrao. Beyond this evidence there is absolutely no evidence for the defendant to prove that Madhavrao was the owner of the lands. My finding therefore, on issue 3 is in the negative."

Now in second appeal it has been argued that the execution of the rajinama and kabuliyat in 1894 must necessarily by themselves amount to a transfer of the property by Chinkabai to Madhavrao. But none of the authorities cited is in favour of so unlimited an assertion. The question in issue was whether such documents required registration, and all that the cases cited can show is, that it was decided that these documents did not require registration, but could amount to evidence of transfer of the property to which they related. But the Courts have never gone so far as to hold that the execution of these documents must necessarily amount to a transfer, which could not be rebutted by any evidence regarding the manner in which the parties concerned dealt with the property. Each case must necessarily depend upon its own facts, and in one case the Court might be satisfied that the parties who executed a rajinama and kabuliyat intended that the property should be transferred and in another case as in this, the Court might find from the evidence that the execution of these documents was merely for the convenience of the parties especially as in this case, where the party transferring the Khata was a woman. I think we must be bound by the findings of fact in the trial Court, that it was not intended by these documents executed in 1894 to transfer the property from Chinkabai to Madhavrao. It follows, therefore that the property stood in the name of Madhavrao merely for the convenience of Chinkabai and Chinkabai was well acquainted with the fact. Therefore Madhavrao had no title and the plaintiff's mortgage was the only mortgage of the property, so that the plaintiff who had purchased in execution is entitled to the property as against Madhavrao's mortgagee. Therefore the

appeal in my opinion should be dismissed with costs.

Heaton, J.—In this case it is admitted that the appellants must fail unless it is shown that in the year 1894 there was a transfer of ownership of the land in suit by Chinkabai, the then owner to her son Madhavrao. It is found as a matter of fact by both the lower Courts that there was no transfer of ownership, and that finding must be accepted by us unless as a matter of law the existence in the year 1894 of a rajinama and kabuliyat under S. 74, Bombay Land Revenue Code, necessarily constitute a transfer of ownership. It is argued by the appellants that they do. The value of rajinamas and kabuliyats is a matter which has often engaged my attention and I see I have delivered several opinions on the point which appear in the Bombay Law Reporter. One of the latest if not the latest appears in *Narso Ramji Kulkarni v. Nagava Ishvarappa* (1). For many years it seems to have been the opinion in this Court that it was difficult to establish a transfer of the kind here asserted, without a sale-deed; although even then there were indications that the existence of a rajinama and kabuliyat might possibly be a substitute for a sale-deed as documentary evidence of a transfer. In recent years it has, I think, become established that you can have a transfer of agricultural lands without a sale-deed and that a rajinama and kabuliyat may in certain cases be, for substantial purposes as good evidence of a transfer as a sale-deed itself. But of course before you can hold that a rajinama and kabuliyat really do evidence a transfer of ownership, there must be either evidence or indications furnished by lapse of time and possession and so forth that there was in fact an intention to transfer ownership. A rajinama and kabuliyat do not by any means completely take the place of a sale-deed. They only serve as documentary evidence of transfer if that transfer can properly be inferred from the totality of facts proved; and these must usually at any rate comprise a good deal more than the rajinama and kabuliyat themselves. In this case there is evidence from which both the lower Courts have drawn a conclusion that there was no intention to transfer ownership. It was quite within their

(1) [1918] 42 Bom. 859=45 I. C. 492.

powers to arrive at that conclusion. It seems to me therefore that their finding that there was no transfer of ownership in 1894 is conclusive and that the argument urged by the appellants that a raji-nama and kabuliyat necessarily compel the inference as a matter of law that there was a transfer of ownership is without good foundation. I therefore agree that the appeal should be dismissed with costs.

G.P./R.K.

Appeal dismissed.

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SHAH AND CRUMP, JJ.

Gangaram Hari Parit and others—Accused—Appellants.

v.

Imperator—Opposite Party.

Confirmation Case No. 5 of 1920 and Criminal Appeal No 110 of 1920, Decided on 5th July 1920, from convictions and sentences of the Sess. Judge, Satara.

* (a) Evidence Act (1 of 1872), Ss. 8, 9, 15 and 54—Trial for murder of particular person—Evidence to show that accused had committed two previous murders, is irrelevant and inadmissible—It is evidence of bad character.

In a trial for the murder of a particular person (1) it is not open to the prosecution to adduce evidence to show that on two previous occasions the accused under trial had committed murders themselves but had falsely charged and got convicted some other persons as murderers. Such evidence is irrelevant, because the fact that the previous murders had been committed by the accused does not constitute, under S. 8, Evidence Act, a motive or preparation for the subsequent murder; (2) the case against the accused under trial should be determined on the evidence which is relevant and admissible under the Evidence Act, and not on the strength of evidence which the Court may consider necessary, in the interests of justice, to record and appreciate with reference to two entirely different murders committed by the accused; (3) the evidence to the effect that the accused under trial had committed two previous murders and falsely charged and implicated innocent persons as murderers, amounts in substance to evidence of bad character. Its net result is to create the impression on the mind of the Court that the accused are men of bad character and are in the habit of committing murders and that therefore they must have committed the murder for which they are being tried. But such a line of proof is excluded by the Evidence Act and should not be allowed.

* (b) Penal Code S. 302—Two persons attacked, one killed—Death is intentional.

Where several persons attack two men, G and D., but kill only D., whether their object was to get at G. more than at D. or whether they went at D., mistaking him for G., they shall be taken to have intended to kill D. and there can be no question of the death of D. being accidental.

[P 382 C 1]

(c) Criminal Trial—Retracted confession.

Per *Shah, J.*—A retracted confession carries much less weight than a confession which has been adhered to. [P 391 C 2]

(d) Criminal Trial—Evidence—Two rival stories of commission of crime—Falsehood of one story, proves truth of other.

Per *Crump, J.*—Where two rival stories as to the commission of a crime are mutually exclusive, anything which tends to show that one is false, must necessarily go to prove that the other is true. [P 396 C 2]

(e) Evidence Act, Ss. 8 and 9—Motive is that which moves one to do a particular act.

A motive is that which moves a man to do a particular act. It is that which is in his mind which moves him to act, and whether the belief which produces that state of mind is true or false, the motive remains the same and the truth or falsity of the belief is not really in question. [P 396 C 2]

(f) Criminal Trial—Confession can be acted upon though retracted.

A confession is after all an evidence in so far as it bears upon the crime into which the Court is at the time inquiring and circumstances corroborating the confessions upon material points are in themselves equally immaterial. [P 397 C 1]

Unless there is something in the evidence which conflicts with a confession, there is no reason why that confession should not be acted upon even though it is retracted at a later stage on the trial. [P 399 C 2]

(g) Criminal Trial—Inquiry while trial of another offence is not proper.

A desire to correct a miscarriage of justice is no reason for making an inquiry while the trial of another offence is going on, unless that inquiry is on matters directly connected with the crime actually under trial. [P 397 C 1]

(h) Evidence Act, S. 9—Person named offender absconding—He can explain his conduct.

If after the commission of a crime a person whose name is mentioned as a participant in the crime, absconds, his conduct shows that he is indeed concerned in the crime. Therefore anything which tends to explain his conduct and furnishes a motive other than a guilty conscience, is relevant under S. 9, Evidence Act.

*I. N. Mehta and A. A. Khan—*for Appellants.

*S. S. Patkar—*for the Crown.

Shah, J.—This is really an extraordinary case. The record of the case is exceptionally heavy. In the lower Court there had been 72 hearings, nearly 200 documents were put in and more than 150 witnesses examined. In this Court the hearing of the case has taken nearly 8 days. The main story for the prosecution is very unusual. But the most extraordinary feature of the story, for which it would be difficult to find a parallel, is that the prosecution now seek to establish that on two previous occasions in two murder cases false stories.

were put forward, that in one of them really innocent persons were convicted, and that it is necessary in the interests of justice to revise the conclusions reached by this Court in the case in which 5 out of 6 accused were ultimately convicted.

The charges against the eleven accused persons in this case relate to the murder of one Dadu Parit. All the accused were charged with having conspired to bring about the murder of this Dadu under S. 120-B, I. P. C. Accused 2, 8, 9 and 10 were further charged with the murder of Dadu under S. 302, and accused 1 and 7 were charged with being present at the murder under Ss. 302 and 114, I. P. C. A charge under 118, I. P. C., was added against accused 3 and 6 at the close of the trial. The accused were tried by the learned Sessions Judge of Satara with the aid of assessors. One of the assessors found all the charges proved against all the accused; the other assessor agreed with regard to all the accused except accused 3 and 6, with regard to whom he was of opinion that they were guilty under S. 118, and not under S. 120-B, I. P. C. The learned Sessions Judge came to the conclusion that all the charges against all the accused except accused 3 and 6 were made out; and as to accused 3 and 6 he was of opinion that they were guilty under S. 118, I. P. C. He passed separate sentences against the other accused who were charged with more offences than one. In the result accused 2, 4, 5 and 7 were sentenced to transportation for life and accused 1, 8, 9, 10 and 11 were sentenced to death subject to confirmation by this Court. We have to consider the case in connexion with the confirmation of the death sentences and the appeal preferred by all the accused except accused 3 and 6. Accused Nos. 3 and 6 were sentenced to short terms of imprisonment, and they have not appealed to this Court.

We have heard arguments on both sides. At the outset I desire to acknowledge the assistance which this Court has received in the consideration of this case from the judgment of the lower Court, which throughout bears the impress of care, clearness and patience in the presentation of the case. I also desire to acknowledge the assistance which we have received from the arguments urged on both sides, particularly on behalf of

the appellants. It is a matter of satisfaction to find that all that could be urged on behalf of the appellants and on behalf of the Crown has been put before the Court, and that in dealing with such a huge record we have been assisted with full arguments on both sides.

I shall first state the essential part of the story for the prosecution. That story is that on the morning of 30th August 1918 (Friday) at the house of Shripati, accused 11, in the village of Shigaon, all the accused, the two approvers, Mahadu and Nana, and the two Mangs, Santu and Yesu, met. There were also present Bala Ashte and Rama Satu. There Gangaram, accused 1, suggested that in order to run in their enemies they should arrange to kill his brother Dadu and that he was quite willing to help them in that task. The object of the murder was partly personal to Gangaram and partly common to the conspirators. The conspiracy in the main is said to have been formed with a view to implicate some of the enemies of some of the accused on a false charge of murder. In the morning the idea suggested by Gangaram is said to have been generally accepted, and the details were left to be settled in the evening. Before they met in the evening, it is said that Shripati in company with some of the accused went to persuade Dadu to accompany Gangaram to the Sangli Bazar on the following day. The idea was to murder Dadu when Gangaram and his brother would return from the Sangli Bazar, where they were expected to go on Saturday and to pass by the Samdoli Nalla on their way back in the early morning of 1st September (Sunday). It is said further that after Shripati persuaded Dadu to accompany Gangaram, practically the whole party again met at the house of Shripati at night and settled the details. Santu Bagdi was present then, and accused 7 was not present. In pursuance of this conspiracy, it is said that accused Gangaram with his brother Dadu, the approver Mahadu and the two Mangs left Shigaon for Sangli. The occasion for this visit was said to be that Dadu had lost a bullock a short time before this and was in need of one bullock. He was not prepared to pay the price which Gangaram asked for one of his bullocks, which he had for sale. The idea was apparently to have it ascertained in the Sangli market whether

Dadu could make a more profitable bargain or whether the price which Gangaram asked for his bullock was fair. Accused 7, who is said to have been present in the morning meeting at the house of Shripati, was not present in the evening. He said that he had to go to Arjunwadi and that he would meet the party at Sangli. Accordingly accused 7 is said to have left Shigaon on Friday and joined Gangaram and Dadu and their other companions at Sangli on Saturday in the afternoon. The party, consisting of the two brothers, the two Mangs, the approver Mahadu and accused 7, left Sangli in the evening and after crossing the river stayed at Sangalwadi for the night. All of these persons except accused 7 stayed in the house of one Usman and accused 7 went to a relation of his. Early in the morning all of them left Sangalwadi for Shigaon and sometime between 4 and 5 A. M. they reached the Samdoli Nalla, which is nearly half way between Sangalwadi and Samdoli. In pursuance of the scheme which was formed, accused 2, 8, 9 and 10 and the approver Nana are said to have left Shigaon in the evening of Saturday, 31st August, for the Samdoli Nalla and to have waited in the Nalla for the party to reach from Sangalwadi on their way to Shigaon.

As soon as the party reached there, in accordance with the scheme, the accused 2, 8, 9 and 10 attacked Dadu and killed him on the spot. Some slight injuries were also caused to Gangaram, in order to make it appear, it is said, that Gangaram was the object of the attack and that the brother of Gangaram was murdered on account of enmity with Gangaram or on account of being mistaken for Gangaram by the assailants. While this attack on Dadu was going on, accused 1 is said to have kept a watch on the Sangalwadi side of the Nalla to keep away those who might pass by the Nalla on their way back from Sangalwadi to Shigaon or to any other place on that side. It is said that two witnesses, named Ganu and Rau, arrived there and accused 1, 8, 9 asked them to turn back and that they turned back in fear and went to their respective places, Shigaon and Bahadule, across the fields. The accused 2, 8, 9 and 10 and the approver Nana, who formed the party which had left Shigaon for the murder of Dadu, at

once hastened back to Shigaon. Accused 1 and the two Mangs remained in the Nalla and Mahadu went to Samdoli to give information to the Patil.

This is the story for the prosecution in its essentials. The case for the Crown is that Dadu was murdered by some of the accused in pursuance of the conspiracy which was formed among all the accused. In order to explain however how these accused came to entertain the desire to murder a brother of one of their own party, it is said that accused 1 and 7 to 11 really were old associates and in order to explain the old association, the prosecution rely upon certain broad events prior to January 1918, dating so far back as 1912. I shall state these events briefly, even though all the evidence relating to these incidents may have at the best a remote bearing upon the case in order to explain the prosecution story. It is said that in 1912 security proceedings under Ch. 8, Criminal P. C., were initiated against Shripati, the present accused 11, Yesu, the present accused 7, Gulmya, an important witness in the case, Santu Bagdi, also an important witness in the case, Santu's brother Vithu and Dnyanu Naga. Those proceedings terminated on 28th February 1912 in an order against all these persons requiring them to furnish security. In these proceedings among other persons Dhondi Murari, Nana Gundi, Dnyanu Hari, Ganu Hari, Sakharam Daulat and Gangaram Parit gave evidence against Shripati and his associates. The present accused 9 and 10, Dadu Govinda and Balu Desai, gave evidence on behalf of the defence in those proceedings. Soon after this there was a case relating to the theft of grass. The proceedings in this case were initiated at the instance of Ganu Hari, and in that case the accused were Shripati and Yesu. They were found guilty and sentenced to pay substantial fines on 30th April 1912. In respect of this very theft proceedings were intended to be taken against one Sakharam Govind, who is a distant relation of Shripati; but as he was not found at the time, they could not be instituted against him. Ultimately Sakharam Govind was charged with theft and was discharged on 9th February 1914. It is part of the prosecution case that there were differences between Shripati and Yesu on the one hand and Sakharam

Govind on the other as to the share to be paid by Sakharam in the fines which Shripati and Yesu had to pay under the sentence passed against them in April 1912.

The next incident relates to the murder of a young daughter of Santu Bagdi. Apparently, according to the case then put forward, there was a 'maramari' between Santu Bagdi and his brother Vithu and some of the accused who were charged in that case; and in the course of that 'maramari' the daughter of Santu who was being taken by Vithu, was said to have received injuries of such a character as would make the offence culpable homicide not amounting to murder. It may be mentioned that this incident of the 'maramari' is said to have taken place soon after some security proceedings were apparently initiated against Santu. The result was that five persons were charged and tried in connexion with the injuries received by the girl, who died as a result of those injuries. Those five persons were Nana Gundi, Sakharam Daulat, Dondi Murari, Hari Bande and Gangaram, the present accused 1. The case however was not established against these accused and in the result they were acquitted, though it was observed by the trial Judge that in fact there was a 'maramari' between the two parties as alleged by the prosecution and that the injuries to the girl were caused by some of the accused in that case. All these five accused, it may be noted, had given evidence against Shripati and his associates in the security proceedings. The present case for the prosecution with regard to this incident is that the whole case was false and that in fact the girl was murdered by some of the persons concerned as witnesses on behalf of the prosecution in that case and that a false charge was laid against those accused who were believed to be the enemies of Santu Bagdi and his other companions. I mention this only as a part of the prosecution story. It may be mentioned here that though Gangaram the present accused 1, was one of the accused then, according to the present prosecution case he had really been reconciled soon after with Shripati, and that in fact he had become his associate. The decision in the Bagdi case was on 2nd March 1915.

The next event relates to Gangu's murder. On 16th October 1915, which was the night preceding the Dasara day of that year, it is said that Shripati and his then companions attacked one Vishnu Patkar in the procession which was passing that night by the house of Shripati. It is said that Shripati had a grudge against Vishnu Patkar in connexion with the roll call which he had to attend when Vishnu Patkar was in charge of the police patil's work. Vishnu Patkar was assaulted and it was then said that certain persons, whose names I shall presently mention entered the house of Shripati, two of whom attacked Shripati and the other four murdered Gangu the widowed sister of Shripati. The six persons charged with reference to the murder of Gangu and the attack on Shripati were Dhondi Murari, Sakharam Govind, Gangu Hari, Dnyanu Hari, Tatyanna Desai and Babaji Bahiru. In the result these six persons were tried by the Sessions Judge of Satara and convicted of the offences with which they were charged. Dhondi Murari was sentenced to rigorous imprisonment for seven years, Sakharam Govind was sentenced to three years' rigorous imprisonment and the other four were sentenced to transportation for life. Among the witnesses who were put forward in support of the then prosecution story, there were four persons who had turned round and refused to support the prosecution story at the trial. Those witnesses were Sakharam Gurav, Abdul Chand, Ahmed Korbi and Dnyanu Ramoshi.

The only witness who supported the prosecution case over and above Shripati was Gangaram, the present accused 1. The evidence of Shripati and Gangaram was believed then, with the result which I have already stated. The accused appealed to this Court and in the appeal Sakharam Govind was acquitted but the convictions and sentences of the others were confirmed. The case of Dhondi Murari and others was decided by the Sessions Judge on 10th January 1916 and the appeals were decided on 30th March 1915. The present case for the prosecution is that this case was entirely false and that in fact Gangu was murdered by Shripati and his associates, and that injuries on Shripati were deliberately in-

flicted to make it appear that he was the object of attack and in order to give a point to his evidence which he wanted to give at the trial against his enemies. The proceedings with regard to the assault on Vishnu Petkar were taken up soon after, and on 5th April 1916 six persons, who were accused in that case, were convicted and sentenced to pay small fines. Those six persons were the present accused 1 and 7 to 11. It is part of the prosecution story that thereafter Shripati continued to trouble Vishnu Petkar and the then patil of the village, and it is claimed for the prosecution that as a result of the troubles created by Shripati, Vishnu Petkar had actually to leave the village. I do not desire to refer to the minor incidents during the years 1916 and 1917, and there is none of any real importance. Here closes the first part of the prosecution story as to the early association of some of the accused. These incidents are referred to for the purpose of showing the enmity between some of the present accused and some of those persons who were falsely charged in the present case in the first instance and also to show the association of Shripati and some of the other accused in this case.

The events which immediately preceded the formation of the conspiracy in question began in January 1918. In that month there was a quarrel between Sakharām Gurav on the one hand and Shripati and some of his associates on the other. It is said that this Sakharām Gurav had refused to give evidence on behalf of the prosecution in this case relating to Gangu's murder and that Shripati had a grudge against him on that account. About this time Sakharām Gurav is said to have behaved improperly with a female relation of one Dnyanu Koli and that Dnyanu Koli sought the protection of Shripati. As a result on 21st January, when there was a fair at Bhendaved, some of the present accused, including accused 11, beat Sakharām Gurav. A few days after on 31st January there was a fair in the adjoining village of Letavde and Sakharām Gurav, finding the present accused 1 alone, beat him, because he had beaten him on the previous occasion. This news is said to have been communicated at Shigaon to Shripati Bala, and while Sakharām Gurav and some of his compa-

nions and Gangaram were returning to Shigaon from the fair, they passed by the side of the hut of Gulmya. This Gulmya is the same man as was charged along with Shripati in the security proceedings in 1912; and about this time he used to live in a hut near Shigaon on the way between these two villages. Near his hut Gangaram tried to beat Sakharām Gurav and his other companions beat Gangaram. Gulmya did not help Gangaram, and when Shripati and his other companions came up there and when they tried to beat Sakharām Gurav Gulmya actually interfered and protected Sakharām Gurav. This incident is said to have incensed Shripati against Gulmya. I may pause here to mention that Gulmya was formerly an associate of Shripati, that he was a man of daring nature and that according to the present prosecution story he had helped in arresting an outlaw in the adjoining Kolhapur territory. Shripati was aware of his strength and his nature, and he was afraid in his mind of the growing difference between him and Gulmya. I may also mention that after the Bagdi murder case Santu Bagdi is said to have left Shigaon and gone to live at Akhalkop. Santu Bagdi apparently kept well with Shripati on the one hand and with Gulmya on the other.

The next incident, which is relied upon by the prosecution, is the quarrel between Shripati and Gulmya. After this incident about Sakharām Gurav about the end of January Gulmya was actually called by Shripati; and it is said that at that time Gulmya was not persuaded in the least to Shripati's side, and that there was a quarrel between the two. This incident, it is said, created a desire in the mind of Shripati to strengthen his party, and with that view he used to arrange for Bhajan parties at his place at Shigaon. About this time, either as a result of the attraction afforded by Bhajan parties or otherwise, accused 2, 3, 4, 5 and 6 are said to have joined Shripati's side. Sakharām Gurav is said to have gone over to the side of Shripati out of fear. Soon after this, it is said that all the present accused with some others including Sakharām Gurav, actually went from Shigaon to Akhalkop with a view to take an oath at Audumbar, which is a Wadi near Akhalkop on the banks of the Krishna river. It is said that the whole

party, i. e., all the present accused and the two approvers, actually took oaths of fidelity. It is said for the prosecution that while the party was on their way to Audumbar, accused 11, Shripati actually suggested that something ought to be done to get at Gulmya and that it was with a view to secure the assistance and co-operation of the whole party that this oath was to be taken at Audumbar. This was on 4th March 1918. After this oath incident an application (Ex. 130) was made by Shripati on 12th March 1918 to the Assistant Superintendent of Police. In this application there is a reference to the attack on Shripati and the murder of Gangu, and it is said that the relations of those persons who were then prosecuted and sentenced were planning to murder him and that actually they had taken vows for that purpose and had formed a conspiracy. Among the names mentioned in that application are to be found three persons who were ultimately charged in the first instance in this case with reference to Dadu's murder, and, according to the prosecution case, falsely. Those three names are Bala Chandra Bande, Bala Babaji Patil, and Keshav Tatyapa Patil.

The name of Sakharam Govind, who was at the time on terms of enmity with Shripati, was mentioned. The witnesses mentioned in this application by Shripati on his behalf in support of his allegation in the petition are some of his associates and some others. It is stated in the application that he was not confident that all the persons mentioned as witnesses will correctly state the facts. The prosecution version about this application is that it was only an indication of what Shripati's own intention was against his enemies, and the defence version is that in fact Shripati and his associates were in danger at the time from the relations of those persons who were convicted in the case relating to Gangu's murder. As a result of this application some inquiry was made, but finally undertakings from two sets of persons were taken. Those undertakings are Exs. 230 and 231. These were taken on 31st March 1919. The undertaking is that

"none of the signatories will do any act against law or religion or commit any deed whatever which is likely to cause shock to the life or honour of any person (against the people of Shigaon)."

Among the signatories on the side of Shripati were all the present accused except accused 4, 5 and 8. The two approvers and Sakharam Gurav also had signed this undertaking. On the other side there were several signatories, including Gulmya and most of the persons who were suspected in the application by Shripati on the ground of relationship with the persons convicted in Gangu's case.

The next incident relates to the marriage of Sakharam Govind, who had lost his wife some time back. This Sakharam Govind was one of the accused in Gangu's case and was ultimately acquitted. It is said that Shripati did not wish that Sakharam Govind, who was a distant agnate, should re-marry. A match was arranged between Sakharam and a girl of Kanegaon. It is said that Shripati and his associates took particular trouble to have this match broken off. It was in fact broken off and Sakharam Govind sought the assistance of Gulmya. With the help of Gulmya a match was arranged with a girl at Aitavde. This incident seems to have given fresh impetus to the feeling of Shripati both against Gulmya and Sakharam Govind. It is a part of the prosecution case that this Sakharam Govind was advised by his relations to make up with Shripati, and it was only a few days before the actual murder of Dadu that Sakharam Govind and Shripati were reconciled.

Then in July of that year a beam was stolen from the house of one Lakhu in this village. Lakhu was apparently a poor man and with the assistance of Gulmya he lodged a complaint in respect of this theft against Gangaram, who was said to have stolen the beam. An attempt was made to search the house of Gangaram, but he flatly refused to allow any search being taken. Ultimately after some time when the search was taken, the beam was found in the adjoining house of a Jangam. This case was a source of trouble to Gangaram and through him to Shripati, who is said to have tried his best to find some way for Gangaram out of the difficulty. With that view there was a sort of compromise between the parties and on 11th August actually a compromise application was put in, which proceeded on the basis that this beam was in fact sold by Lakhu to Gangaram, that Gangaram had

not paid the price of this beam and that therefore Lakhu had charged him with the theft of the beam, though in fact the beam was voluntarily parted with in favour of Gangaram by Lakhu. Before this however Gangaram had made a statement to the Police Patil on 22nd July, in which he stated that some of his enemies actually tried to thrust the beam in question through a hole in the back wall of his house. In brief his statement was a complete repudiation of the charge of theft. After the compromise the Sub-Inspector reported that the case of theft might be dropped; but the Assistant Superintendent of Police declined to allow the proceedings to be dropped and directed that the case should be proceeded with. This was on 24th August; and the Sub-Inspector issued orders to arrest Gangaram in pursuance of this direction. This was on 25th August, just a few days before the conspiracy in question is said to have been formed with a view to murder Dadu.

In point of time the sequel of this case comes after the main event of the prosecution story. But I may finish all reference to this theft case here by stating that ultimately the case was tried and decided in December, with the result that Gangaram was discharged. The statement that Gangaram then made in defence was not that there was any kind of purchase of this beam by him from Lakhu, but that it was a false case and that he was innocent of the charge. By this time the proceedings in respect of Dadu's murder had commenced against those persons whose names were mentioned in the first instance by Gangaram, to which I shall presently come, and who were then absconding or under arrest, with the result that at the time the case was tried Lakhu had no witnesses on his side. The result under the circumstances was in favour of Gangaram. It would appear from all the papers connected with this case that probably the truth was to be found in the first statement made by Lakhu by way of complaint. But anyhow the bearing of this theft case is that about this time matters had come to a head between Gangaram and his associates on the one hand and some of those persons who were believed by them to be their enemies and who were helping Lakhu on the other.

However before this compromise application was made on 11th August, it is said for the prosecution that some of the villagers had gone to the police and complained that Shripati and his associates were moving about in the village with axes and other instruments in their hands and flourishing them on the village roads and that they were causing terror to them. This was apparently in the beginning of August; and on 3rd August an application was made, which was actually signed by Shripati, Dadu Govinda, Balu alias Ramrao Hindurao Desai and Bahiru Hari Patil, i. e., accused 11, 9, 10 and 3 respectively, and whereon the signatures of some others were made by Ramrao Hindurao, accused 10. Among the persons whose signatures were made on the application by mark were accused 2 and 4 and the two approvers. Accused 1 and 5 to 8 had not signed the application. This application was made to the Collector of Satara. In that application it is suggested that several persons, including Gulmya, Dadu Daji, Bala Chandra Bande and Sakharam Govind, actually met and conspired for the purpose of murdering the signatories to the application. It was also suggested in that application that a fund was being raised by some of those persons, who were members of the conspiracy alleged in that application, against Shripati and his associates. There is a prayer that bandobast should be made so that they could move about freely, the burden of the complaint being that their movements were considerably restricted on account of the great fear created in their minds in consequence of the alleged conspiracy.

This application apparently was taken notice of really after the material time, i. e., when the second investigation in this case commenced. The case for the prosecution is that this application was false in fact, so far as the allegations were concerned, and that it was made by the accused with a view to create evidence in their own favour when they carried out the scheme which, it is said, they themselves had in view. It may be mentioned here that after this application an attempt was made with reference to the theft case to get at Lakhu and to threaten him to compromise, and it was as a result of those efforts, it is said, that Lakhu pre-

sented the compromise application on 11th August.

This really finishes the account of the incidents which immediately preceded the formation of the conspiracy in question and it is claimed for the prosecution that all these incidents really led to considerable estrangement between Shripati and his associates on the one hand and Gulmya and some of the relations of the persons who were convicted in Gangu's case on the other hand. I have already stated the prosecution story relating to the conspiracy formed on 30th August, the visit of Gangaram, Dadu, the two Mangs and the approver Mahadu to Sangli and their return back on the same date at Sangalwadi with accused 7, and the actual murder of Dadu and the injuries caused to Gangaram in the Samdoli Nalla on the early morning of 1st September.

I shall now briefly refer to the investigation which immediately followed the murder of Dadu. It may be mentioned here that this Samdoli village is in the Tasgaon Taluka and it is isolated from the rest of the Taluka by the Native State territory. It is in charge of the Sub-Inspector of Palur in the Tasgaon Taluka. Shigaon is situated in the Walwa Taluka and is about eight miles away from Samdoli. The Nalla which runs partially along the road from Sangalwadi to Samdoli is situated about a mile and a half from Samdoli. It is said that after this murder Mahadu, the approver, went to Samdoli and informed the police patil that their party was attacked by six persons, viz., Kesu Tatya, Krishna Subhana, described in these proceedings as Gulmya, Balu Babaji Patil, Bhiwa's grandson Dadu, Bala Chandra Bande and Atma Bhau and that they murdered Dadu Parit in the Nalla between Samdoli and Sangalwadi and injured Gangaram who was on the point of death. As a result of this information the patil wrote two chits, one to the Sub-Inspector at Palur and the other to the police patil at Shigaon. These chits are Exs. 159 and 160 in the case. In the report to the Sub-Inspector he mentioned the fact of the murder and of the murdered man lying in the Nalla. It is also stated there that Gangaram had also received injuries from an axe, but was not dead. In the note to the Police Patil of Shigaon he mentioned the

fact of the murder of Dadu Parit and of the offenders having run away. He requested the Patil of Shigaon to send the heirs of the deceased and to take steps to arrest the culprits. The names of the culprits were mentioned in that note. These six names I have already stated. It was also stated that there were four more persons among the assailants who could not be recognized. The patil went on the spot where Gangaram was lying and there made the usual inquest report in the presence of the punch. He recorded the statements of Mahadu and Gangaram, who apparently had received some injuries. The story put forward in the statement of Gangaram was that as soon as the party from Sangalwadi reached the Samdoli Nalla, out of these assailants two persons, Atma Bhau and Dadu Daji, came forward and caught hold of him and hit him with an axe on the left thigh and with a stick on the right arm and when he turned round he found that all the assailants attacked Dadu and were murdering him. The names of six of these assailants were mentioned in the statement. It was also stated by Gangaram then that the reason for the attack apparently was the enmity between him and those assailants in connexion with Gangu's murder.

According to the police patil the chit to the Patil of Shigaon was sent at about 10 o'clock with a Mahar woman. The patil returned to Samdoli after the inquest was made, and when he went to the village Chavdi, he found accused 10 and 11 and some others present there. In the evening the patil recorded the statements of Yesu (accused 7) and the two Mangs who were present at the scene of offence. The case for the prosecution is that after Dadu's murder accuseds 2, 8, 9 and 10 and the approver, Nana, went back to Shigaon, and informed Shripati that the act was committed, that accused 10 and 11 with some others hastened from Shigaon to Samdoli with a view to see how the investigation was proceeding and that it was in consequence of the information received by Shripati in the morning of 1st September that he and accused 10 and some others were able to go to Samdoli by the time the patil went to the village Chavdi. The patil arranged to have the dead body brought from the Sam-

doli Nalla to Samdoli and before any of the relations of the deceased Dadu arrived, the dead body was actually sent to the Islampur Dispensary, Islampur being in the Walva Taluka. It is about 20 miles from Samdoli. The dead body was accompanied by Gangaram, accused 6 Mahadu Lohar, Nana, the approver and a Ramoshi. The note to the Police Patil at Shigaon is said to have reached there at about 2 p. m. He informed the mother and other relations of the deceased, and as a result of this information, the mother Jija, her two daughters-in-law and her sister-in-law Yamunabai and her relations Sakharam and Krishna, and a neighbour, Kesu left Shigaon for Samdoli. They apparently reached Samdoli in the evening. By that time the dead body was already on its way to Islampur. They protested against the dead body having been sent away in that manner and they tried by short cuts to overtake the dead body. They met the party accompanying the corpse at Digraj, and there Gangaram apparently did not talk to his mother. The females went back to Shigaon. The male relations of the deceased went with the dead body. Kesu who had accompanied the party from Shigaon, stayed at Samdoli. The Sub-Inspector arrived at Samdoli on the evening of the 2nd September and he found accused 10 and 11 there in the village. As I have stated, they had already arrived there on the previous day. The Sub-Inspector went to the scene of offence and tried to trace the foot-steps of the supposed assailants with the help of accused 10 and 11, and after spending some time after this apparently fruitless pursuit they returned to the village. Then the statements of the two Mangs, Mahadu the approver and Yesu, accused 7, were taken. The Sub-Inspector went to Shigaon accompanied with accused 10 and 11 on 3rd September to make enquiries there. He found that all the six persons, whose names were mentioned as assailants of Dadu, had absconded. He also found in the course of the enquiries some indication of the version that the names of those six persons had been falsely mentioned. He went back to Samdoli on 4th September. He states as follows:

"Jamadar Ingle was with me at the beginning of my investigation. He brought me Gulmya's wife and Atmaram's father to Samdoli,

saying the relations were complaining that the accused were innocent and saying that the present accused had committed the offence. This was on the 4th September. I asked accused 10 and 11, and they said it was false. I took accused 10 and 11 to be gentlemen, as I did not know any of these people before. They were decently dressed and well behaved."

Mahadu, the approver, and the two Mangs were sent to the Magistrate at Tasgaon, to have their statements recorded under S. 164, Criminal P. C. and apparently for the time being the version which was put forward by Gangaram in his first statement held the field. However as all the six persons, who were then mentioned as the assailants, were absconding, nothing of importance happened. The investigation seems to have taken then a somewhat leisurely course. Apparently no serious efforts were made to get at those who were then mentioned as the assailants, but accused 10 and 11 were prepared to render assistance to the Police and ultimately on the 14th November Atmaram Babu was arrested. On the 17th November, Bala Babaji was arrested and on 8th December, Bala Chandra Bande was arrested. It is the prosecution case that during all this time accused 10 and 11 not only helped the police in getting at these accused but were also trying to induce some of these persons, who were then accused to give evidence in support of the story which was put forward by Gangaram. The two Mangs apparently died at this time; and this may have led Shripati to think of having some new evidence. The other three persons could not be arrested. The case against these persons was sent up to the Magistrate, and it was pending in that Court until the beginning of February, when steps were taken by the second investigating officer to have these three accused, who were then in custody released on bail. Ultimately the case against these persons was withdrawn on 6th March.

It may be mentioned however that when in the beginning of September the investigation took this course, some of the relations of those persons, who then were mentioned as the assailants, had commenced to raise their voices and to demand inquiry from higher officers. On 4th September a telegram was sent by Dadu Tatya to the District Magistrate, on 5th September a telegram was sent by Krishna Babaji to the District Superinten-

dent of Police, and on the 6th September a telegram was sent by the wife of Gulmya to the District Superintendent of Police. This last telegram was in these terms:

"My husband's and nephew's names taken in Dadu Parit's murder, Kindly requesting your presence for real inquiry."

The mother of the deceased Dadu made two applications on 10th September 1918 one to the Collector of Satara and the other to the District Superintendent of Police, and in these applications she complained of the investigation that was going on. Some applications were made by Bahu Naiku, the father of Atmaram. He made his first application on the 28th September, which is Ex. 148, and his second application on the 31st October, and ultimately he presented two applications in quick succession which are Exs. 10 and 11, on 1st and 3rd January 1919, respectively. In those two applications he has set forth the present case for the prosecution in some detail. In short, the burden of all these complaints was that a fresh investigation by an independent officer was necessary and that the real assailants were not those who were then mentioned as the assailants and against whom the investigation had then proceeded. As a result of these various complaints reaching different authorities, ultimately on the 13th January, Rao Saheb Metkar, Police Inspector in the Criminal Investigation Department, was called to carry on a fresh investigation. It is not clear from the proceedings as to which particular application proved effective in this direction. But it appears that considerable time elapsed before the actual commencement of the second investigation. It is said that on the 26th January Santu Bagdi made a full disclosure of all the events, which led up to the murder of Dadu, and of the real truth about the murder of Dadu according to the prosecution. It was as a result of this statement made by Santu Bagdi to the Police Inspector who was placed in charge of investigation that steps were taken to release those three persons on bail and ultimately to withdraw the case against them. The investigation then proceeded fairly promptly. The Police Inspector examined two witnesses, Ganu and Rau, on the 3rd February and on the 4th February he arrested accused 2 and 7 to 11 and the

two approvers, Mahadu and Nana. Accused 2 was sent up to the Magistrate and he made a confession on the 5th February. The two approvers made confessions, who were then in the position of accused persons, on the 6th February. Accused 10 made his confession on the 7th February and accused 4, 5 and 6 are said to have been arrested on 9th. Accused 4 and 6 made their confession on the 10th and No. 5 made his confession on the 11th. About this time the Assistant Superintendent of Police was present on the spot to see how the investigation was going on; and ultimately the case against the present accused was sent up on the 21st February. Accused 1 who had not been arrested so long, was ultimately arrested on the 4th March and he made a confession on the 6th March. Accused 3, who had escaped detection so long, was arrested on the 14th March and his confession was recorded on the 15th March. Apparently after this was done, the investigating officer prosecuted his investigation with reference to the two earlier murder cases. That investigation was commenced in April, and as some time was spent in making that investigation, the proceedings before the committing Magistrate were delayed to that extent. Ultimately the present case was committed to the Court of Sessions, and I have already stated the result of the trial.

It will thus appear that there are two rival theories in the field as to the real truth of this murder. According to the prosecution the present accused are responsible for the murder of Dadu. It is said that they murdered Dadu in order to have an opportunity of running in their enemies on a false charge. The other theory is the defence theory, viz., that six persons, who were specifically mentioned, at the very earliest opportunity, by Gangaram, were the real assailants, that the first investigation was really carried on, on the right lines and that the second investigation has resulted in obscuring the truth about the matter. We have really to consider which of the two theories represents the truth. I may mention here at once that even if it be proved that the six persons, who were mentioned by Gangaram as being responsible for the attack on Dadu and himself, are shown not to be the real assailants, still on the evidence it must

be considered whether the case against each one of the accused is established. But in view of the two rival theories it is a matter of importance to take into account the evidence relating to the innocence of the six persons who were mentioned as the assailants.

At the start, I desire to deal with the question of law as to the admissibility of certain evidence which has been raised on behalf of the defence. It has been urged that the evidence now adduced by the prosecution, to show that the prosecution theory as then put forward in the Bagdi murder case was false and also that the theory put forward by the prosecution then in the case relating to Gangu's murder was false, is inadmissible. It is urged that it really amounts to evidence of similar acts showing either habit on the part of some of the accused or establishing their bad character. It is also urged that the admission of this evidence really puts the accused on the defence not only as to the murder of Dadu but as to other murders as to which no charges are framed, but which are made indirectly the subject-matter of the inquiry. On the other hand, it is urged that this evidence is admissible under Ss. 8 and 15, Evidence Act, and that though it may show either habit or bad character, it is relevant as showing motive, preparation and conduct of the accused in the present proceedings, and as showing that the attack on Dadu was not accidental but intentional. The learned Sessions Judge was of opinion that the evidence was admissible, and in fact he has admitted evidence relating to both these murders to show the real character of those murders. The learned Judge, in giving reasons for this view, has not referred to any section of the Evidence Act; but perhaps he had in view S. 8, Evidence Act. This I gather from the words, motive, preparation, and conduct used in one part of his judgment. But whatever section he may have in view, he has given reasons which I shall consider while dealing with the argument urged here by the learned Government Pleader. S. 8 provides that

"any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact."

I do not think that the real truth about those murders can be said to constitute a motive or preparation for any fact in

issue in the present proceedings. The motive alleged is that with reference to the six persons who are said by the prosecution now to be falsely charged, Shripati and his associates were actuated by feelings of enmity against them. The fact of enmity may be proved, but I do not see how it can be said that the real truth about the murder of Santu Bagdi's child or the murder of Gangu can be said to constitute a motive or preparation for any fact in issue or relevant fact connected with the murder of Dadu. The learned Judge has placed this ground of motive first among his reasons for admitting this evidence. I am unable to accept his view that the real truth about those cases suggests a motive for this murder. It may to a certain extent explain the fear which Shripati entertained from the relatives of those who were accused in those cases. It seems to me however that that fear would exist whether those persons were really guilty or innocent. The very fact that some of those who were acquitted in the first case were believed by Shripati and his associates to be their enemies, is an indication that the real truth of the case had not such a direct connexion with the feeling of enmity. It is then urged that under the second part of S. 8

"the conduct of any person, an offence against whom is the subject of any proceeding, is relevant if such conduct influences or is influenced by any fact in issue, or relevant fact, and whether it was previous or subsequent thereto."

I do not think that this clause helps the Crown. The learned Judge observes that that evidence explains the absconding of the persons falsely accused in the present case, who were warned by the experience of the persons convicted in Gangu's case. I am of opinion that those six persons are witnesses in the case and though they may have been charged, according to the prosecution, falsely at one stage of the proceeding, these persons are not the accused persons before us. I do not think therefore that the second ground urged by the learned Sessions Judge and relied upon by the Government Pleader is covered by S. 8. Ground 3 urged by the learned Judge is that the confessions referred to this story about Gangu's murder and that the truth of that statement must be tested. I do not think however that that by itself affords any ground for admitting evidence which is not directly shown to be relevant

under any of the sections of the Evidence Act. The last reason mentioned by the learned Judge is that it is the duty of the Court to inquire into the allegations as to miscarriage of justice with a view to bring the matter to the notice of Government. It may be perfectly appropriate for the Court to make such an enquiry and to set right, so far as it can, any miscarriage of justice. But it is equally necessary to see that the question of the guilt of the present accused, who are on their trial on charges relating to a particular murder is determined on the evidence admissible under the Evidence Act, and not on the strength of evidence which it may be necessary to record and appreciate with reference to two different murders altogether. The interests of justice require that an inquiry as to the truth about those murders should be made; but it can be made separately. The same interests of justice, in my opinion, require that the case against the present accused should be determined on the evidence which is shown to be relevant under the Act. As regards S. 15 of the Act which has been relied upon, I do not see how it can apply. That section provides that

"When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

In the present case there is no question as to whether the death of Dadu was accidental or intentional. It is the case on both sides that Dadu was murdered and whoever assaulted Dadu intended to murder him. Whether the six persons mentioned by Gangaram actually committed the murder or whether some of the present accused committed it is the real question. But it cannot be said that there is any point as to the death of Dadu being accidental. It may be a part of the prosecution case that in attacking the party, assuming for the sake of argument that the enemies of the present accused were the assailants, the object was to go at Gangaram and not at Dadu. The fact remains that those who went at Dadu did murder him, i. e., they intended to do what their act would show they intended to do. Whether those persons were actuated by a desire to go at Gangaram more than at Dadu or whether they went at Dadu by mistaking him for Gangaram, they undoubtedly murdered him

and there can be no doubt that they intended to do so. There is no question of the death being accidental. I may refer to the observations in *Rex v. Boyle* (1), which suggest the test to be adopted in determining whether evidence of similar acts is admissible under S. 15 or not in a particular case. Though there may be cases in which it may not be easy to determine whether the evidence is admissible under S. 15 or not, I do not think that in the present case there is any difficulty whatever. Though S. 9, Evidence Act, has not been relied upon on behalf of the Crown, I have considered it with reference to the question as to whether this evidence can be let in to explain the conduct of the persons who are said to have been falsely charged.

I have already referred to this consideration, so far as it can be said to fall within the scope of S. 8, and I am satisfied that to explain the conduct of those six persons in absconding when they received the news that their names were given as the assailants of Dadu, the belief on the part of some of them that on previous occasions false charges of that character had succeeded or had been brought would be relevant. There is evidence in this case to show that there was a belief in the village that the accused in Gangu's case was wrongly convicted; and that may be relevant to explain the conduct of the six persons in this case. But that belief might exist whether the accused in that case were rightly convicted or not. In my opinion, that would not entitle the prosecution in this case relating to the murder of Dadu to prove that on two previous occasions some of the accused were concerned in similar murders and in charging others falsely. Taking a broad and general view of this type of evidence, I feel that in effect it amounts to evidence of habit for committing a murder under circumstances as are now alleged to exist. That kind of evidence is not relevant. It seems to me that the 2nd part of Illus. (c) to S. 14 clearly indicates that unless the evidence was particularly directed to show that on a previous occasion any one of the present accused made an attempt to murder any one of the six persons now said to have been falsely implicated, it

(1) [1914] 3 K. B. 339=83 L. J. K. B. 1801=111 L. T. 638=78 J. P. 390=58 S. J. 673=30 T. L. R. 521.

would not be relevant. It is quite clear that the persons concerned in those two cases as accused persons were different. I also feel that there is some force in the argument urged on behalf of the defence as to such evidence being in substance evidence of bad character. Its net result is to create the impression on the mind of the Court that these persons are men of bad character and are in the habit of committing murders and that, therefore they must have committed murder on this occasion. That is a line of proof which in my opinion, is excluded by the Evidence Act and should not be allowed. We have therefore excluded from consideration only that evidence, which has been adduced by the prosecution to show specifically that the charges in both those earlier murder cases were positively false and that the persons convicted in Gangu's case were innocent.

There is a large body of evidence in the case which is, strictly speaking, not irrelevant, but which in my opinion has a very remote bearing upon the main question of fact which we have to decide in this case, and in that category I place all the details of the evidence, both oral and documentary, relating to events prior to January 1918. The broad events which I have referred to are relevant as showing association and as showing enmity between certain persons. But when evidence both oral and documentary is adduced to show the course of events in their details prior to 1918, it is to a certain extent unnecessarily adding to the bulk of the record and to the difficulty of getting at the truth in a case of this kind. I am satisfied that the earlier events, which I have detailed and about which there is really no dispute, show generally that in the beginning of 1918 accused 1 and 7 to 11 were old associates. I may mention here that Gangaram who was one of the accused persons in the case relating to the murder of Santu Bagdi's child, would apparently be on terms of enmity with Shripati, as he had that grievance against him; and it is important to note that he had been reconciled to Shripati soon after the termination of that case. The evidence on this point has been referred to by the learned Judge in detail in para. 23 of his judgment; and I do not desire to examine it in detail. I think that the

fact is sufficiently established and the proceedings in Vishnu Petkar's case, which were against the present accused 1 and 7 to 11, show that they were then concerned in attacking Vishnu Petkar on the common ground of enmity between some of them on the one hand and Vishnu Petkar on the other.

As to the incidents immediately preceding the conspiracy in question, I may say generally that there is considerable evidence with reference to each incident. As regards the beating incident relating to Sakharam Gurav, the evidence has been detailed in para. 40 of the judgment of the lower Court, and I do not desire to add unnecessarily to the length of my judgment by referring to it in detail. Broadly speaking, I believe the evidence to be true and I think that the incident is sufficiently proved; and so is the incident relating to the quarrel between Gulmya and Shripati. The incident about the Audumbar oath also, in my opinion, is proved and has been sufficiently dealt with by the learned Judge in para. 41 of his judgment. I do not think it will serve any useful purpose to examine that evidence in detail here. But I shall deal with the argument which is urged on behalf of the defence and which it seems to me under the circumstances, is the only argument open to the defence with reference to these incidents. That argument is that all these witnesses, and the number is fairly large, have given false evidence relating to these incidents and that the evidence was concocted by the enemies of the present accused, when it was realised that the tables were turned against the accused and the investigation was proceeding against them. Undoubtedly there has been some delay in the investigation and in the examination of some of the witnesses. That delay has been sufficiently explained under the circumstances; and I do not think that the delay affords any good reason for rejecting this bulk of evidence. I must also here reject the argument urged on behalf of the defence that all this evidence is concocted. The witnesses have been examined at considerable length, and in their examination-in-chief their statements have been full and detailed, and they have been cross examined. I do not think that the argument that all this evidence is concocted can be allowed. The application made in March 1918

shows the feeling which Shripati had against those who were mentioned in that petition. As regards the subsequent events those relating to the marriage of Sakbaram Govind and the case relating to the theft of Lakhu's beam are also proved, in my opinion, on the evidence in the case. These incidents in themselves do not directly touch the questions of fact which we have to determine. But they tend to show that about this time in August between Gulmya and some of the relations of the persons, who were charged in the two earlier murder cases on the one hand, and the present accused on the other, the feelings had become very much estranged and that the present accused suspected murder on the part of some of those who were subsequently charged as the murderers of Dadu. These events also explain that the ground was ready for the events which occurred from 30th August to the 1st September. It may be that there is some justification for the suggestion on the part of the defence that from the point of view of the defence theory also the ground was also ready.

But that after all affects the motive on either side; and I am quite willing to assume, in appreciating evidence relating to the incidents from 30th August to the 1st September, that there was a certain degree of bitterness in the minds of those, who believed rightly or wrongly that innocent persons were convicted in Gangu's case, against Shripati and Gangaram. It is possible that Shripati, who might have known as to what the relations of the persons convicted in Gangu's case thought about the matter, might have entertained fears of some harm from them. The crucial point however in the case is as to who murdered Dadu, whatever his motive for murdering Dadu may be. Though the question of motive is important in the case, still ultimately it is a question of secondary importance. The question really is as to who murdered Dadu, and unless the prosecution can establish that the present accused are responsible for the murder of Dadu, the case against them cannot succeed. I have already referred to the defence theory, and in approaching the determination of this important question I desire first to refer to certain circumstances which in my opinion point to the present accused being

concerned in this crime, and not the six persons who were mentioned in the first instance by Gangaram.

The first circumstance in my opinion is based upon the medical evidence in the case. That evidence shows that the injuries to Gangaram were very superficial. He was treated as an outdoor patient from 2nd September to the 13th September; and the reports of the Sub-Assistant Surgeon to the Sub-Inspector, Exs. 14 and 15, made on 4th September and 26th September respectively, clearly show that the serious injuries which Gangaram professed to have received were not in fact serious at all. The injuries are detailed in the report made on 29th January by the Sub-Assistant Surgeon to Rao Saheb Metkar. An examination of the description of these injuries clearly shows that the opinion of the Sub-Assistant Surgeon was clearly justified. The Sub-Assistant Surgeon then expressed his opinion that "the said person (Gangaram), when he came in the dispensary, pretended to be a dead man. But he was not so. He had purposely come there under that pretence."

He also expressed his opinion that most of the injuries described could easily be self-inflicted. It is clear that he was not injured on any vital part and still he remained lying in the Samdoli Nalla for some hours as if he could not move, and he continued to behave in that manner for a long time on that day, even when his mother overtook him at Digraj on the night of 1st September. It is also significant that Gangaram did not talk to his mother. I do not believe for a moment that on account of these injuries he was not in a position to talk. His omission to talk was the result of deliberation and not of inability to speak. I may mention here that the Sub-Assistant Surgeon who examined Gangaram died before these proceedings commenced and he could not be examined. But the notes made by him with regard to the injuries of Gangaram and the post mortem notes with regard to Dadu and the reports which he made, Exs. 13, 14 and 15, are duly proved. This is the only medical evidence on the record. It is quite true that it has not been tested in the manner in which it could have been tested if the Sub-Assistant Surgeon had been available for examination. But these injuries, superficial as they were, clearly show Gangaram's

attitude, that he was very seriously injured and was lying in the Nalla almost as unable to move as the corpse lying by his side, was not justified. The Panchnama, which was made immediately on the same day as regards the injuries on Gangaram, also confirms the medical evidence. At any rate the description in the Panchnama does not show that any serious injury was received by him. This Panchnama might well have been put in by the prosecution instead of leaving it to the defence to put it in. It seems to me that the conduct of Gangaram is consistent with the prosecution theory that it was a part of the scheme that Gangaram should pretend to have been seriously hurt, with a view to make it appear that he was the object of attack. It is also pointed out on behalf of the prosecution, and in my opinion rightly, that Dadu was a very inoffensive person. He had practically no enemies in the village except his own brother; and it would be difficult, the prosecution urge, to believe that the 6 persons mentioned by Gangaram would think of attacking Dadu, as by killing Dadu none of their purpose of rendering harm to Shripati would be effected. Therefore it is said that it was intended to make it appear that Gangaram was the object of attack and that either by mistake, on account of want of light in the early morning hours, or with deliberation they attacked the brother of Gangaram. It is in connexion with this explanation offered by the prosecution that the conduct of Gangaram seems to me to be important. It tells against the defence theory and in favour of the prosecution theory.

The next circumstance to which I desire to refer is the arrival of accused 10 and 11 at Samdoli before the mother and other relations of the deceased Dadu reached Samdoli. In connexion with this point, it is important to remember that the news of Dadu's murder reached Shigaon in the afternoon of 1st September; and the news was communicated by Bala Master, who received the chit from the Samdoli Police Patil, to the relations of the deceased. Now these relations, who have been examined in the case, do not say that any of them went and informed Shripati and sought his assistance. But apart from that, it is clear on their evidence, which there is no reason to distrust on this particular point, that

they left Shigaon and reached Samdoli in the evening of the 1st and that when they reached Samdoli accused 10 and 11 were already there. It is also relevant to point out here that, according to the prosecution case, the woman who carried the chit from the Samdoli Patil to the Shigaon Patil met accused 10 and 11 and others on the way; and it is urged, not without force, that if it is true that the accused 10 and 11 actually met the woman who was on her way to Shigaon while they were proceeding from Shigaon to Samdoli, they could not have left Shigaon in consequence of the news, as is now said, they received from the relatives of Dadu.

The present explanation of accused 11 is that he received the news from the wife of Dadu, that it was in consequence that they left in company with the relations, and that as the relations took a different route, they reached the village a little earlier. That explanation seems to me to be opposed to the evidence of the Mahar woman, and it was advanced at a very late stage of the proceedings. It was offered at the trial, the accused, generally speaking, having refused to disclose their defence before the committing Magistrate. It is also opposed to the evidence of the relations who went from Shigaon to Samdoli on that day. The learned Judge has referred to this circumstance as the most important circumstance in the case. I do not desire to lay so much emphasis upon it. The evidence of the Mahar woman, which was necessarily recorded many days after the event, is the only evidence on the point that they were seen on the way to Samdoli before she reached Shigaon. It would not be safe, in my opinion, to put that weight upon her evidence which this argument demands. I am however satisfied on the evidence of the Samdoli Patil and Dhondi Ramoshi that these persons, accused 9, 10 and 11, with some of their associates, it is not clear which other accused, were at Samdoli before the relations arrived. It is significant that they succeeded in persuading the Patil to send away the dead body before the arrival of the other relations. In securing this result undoubtedly Gangaram's assurance to the Police Patil, when accused 10 and 11 arrived, that his men, i. e., his friends or relations, had arrived, afforded considerable assistance. Of course the pro-

secution say that they were his men and Gangaram wanted nobody else.

But on the theory of the defence it is difficult to understand how Gangaram could assure the Patil that those who had arrived were his men or that he could not wait for his other relations. Anyhow the early visit of accused 10 and 11 to this village Samdoli where apparently they had no such urgent business to go except for the purpose of helping Gangaram, is a suspicious circumstance. I do not desire to examine in any detail the elaborate argument which was urged by Mr. Mehta as to the time when the Police Patil reached the Chavdi. The broad facts, which I have stated, are clear; and it matters not in the least whether the accused 10 and 11 reached the Chavdi at 2 p. m. or between 4 and 5 p. m., as pointed out by the defence. Their conduct, not so much merely in visiting the place as in visiting the place before the relations reached the spot and in inducing the Patil of Samdoli to send away the body before the relations reached, fits in with the prosecution case and does not fit in with the defence theory. With regard to this point I desire to state my conclusion on the evidence definitely that I believe the evidence of the relations of the deceased Dadu, when they say that they went to Samdoli not in company with any of the accused, but in their own company and further that none of them informed accused 11 of the news which was received at Shigaon. I also believe the mother's evidence that Gangaram refused parctically to speak to her, although she attempted to do so when she met him near Digraj. I am also satisfied that on the record of this case it does not appear as to how accused 11 received information of the death of Dadu at Shigaon except in the manner suggested by the prosecution. It is possible however as has been suggested in the course of the argument, that he may have received the information otherwise, and not from the official report. He may have heard about it earlier. That is just a possibility, in support of which there is no evidence. But that is a possibility which must be borne in mind.

The next circumstance is that deposed to by the two witnesses Ganu and Rau, Exs. 298 and 345, respectively. These two witnesses were examined by the Police Inspector on the 3rd February.

Apparently the Judge and the Assessors have believed these witnesses, and on the record I am unable to find any definite reason for distrusting their evidence, though evidence of the type which these witnesses have given must be received with a certain degree of caution, particularly when there has been so much delay in the investigation and when we have regard to the fact that Dadu's murder must have been talked about for such a long time in the village. According to these two witnesses, as they were going from Sangalwadi to Shigaon and as they reached the Nalla, they were prevented by accused 1, 8 and 9 from proceeding further and were threatened to go back. There was some row going on and they felt afraid of proceeding further and did go back. According to these witnesses accused 1, 8 and 9 attempted to turn back those who were proceeding by the Nalla, but did not find themselves in need of any outside assistance when one of their party was being attacked. If these witnesses have told the truth, the prosecution theory is true and the defence theory cannot be accepted. On the whole I am inclined to believe the evidence of these two witnesses, though I am not disposed to lay great emphasis upon this circumstance.

Then I come to the important incident which occurred on the 2nd September at Samdoli. Apparently accused 8 went to Samdoli in the evening of the 1st and he found that the names of the four persons, who had been described in the statement of Gangaram as not recognised were to be mentioned; and the four persons proposed to be implicated according to the prosecution case were Mahadu Tukaram Patil, Bahiru Vithu Patil, Bhagwat Nana Patil and Bala Anna Desai. Accused 3 is said to have interceded for them, and it is said that on the suggestion of accused 11 accused 3 actually went back to Shigaon and brought those persons, who were at Shigaon, to Samdoli with a view to request Shripati not to implicate them. Apparently it was arranged that if those persons would agree not to help the six persons who were already mentioned as the assailants, their names would not be mentioned.

The fact of accused 3 having gone to Shigaon and three out of these four persons having gone with accused 3 from Shigaon to Samdoli on 2nd September

is proved by a number of witnesses. Some witnesses from Samdoli have been examined; they also support this version. The three persons who went to Samdoli are Mahadu Tukaram, Bahiru Vithu, and Bhagwat Nana. Bala Anna Desai was not in the village of Shigaon at the time. I may mention that all these four persons whose names were intended to be mentioned have been examined and Mahadu Patil, Bahiru and Bhagwat all support the prosecution version. There is also the evidence of Bhau Parappa, Ex. 234, who is the brother-in-law of Bala Anna, the evidence of Bala Patloji, Ex. 229, and Kesho Naiku, Ex. 173, and Nana Gundi, Ex. 259, to show that accused 3 went to call these three persons from Shigaon and that the three of them did go to Samdoli. The evidence of the witnesses Tatyā Laxman and Joti Yesu, Exs. 223 and 224, supports the prosecution version as to the visit of those three persons of Shigaon to Samdoli and as to the result of that visit, Ex. 225, Krishna Babaji, who belongs to Samdoli, proves the fact that accused 10 and 11 and other members of the party of the accused were at Samdoli on the 2nd. On the whole I do not see any reason to distrust this evidence or to discard it, as suggested on behalf of the defence. It is needless to examine whether those four persons, whose names according to the prosecution were intended to be mentioned, had any feelings of enmity against any of the accused or against Dadu. Bhagwat Nana is the son of Nana Gundi, who was one of the accused in the Bagdi murder case, and Bala Anna Desai is the brother of Tatyā Anna Desai, who was one of the accused in the case relating to Gangu's murder. Thus apparently there was some motive on the part of some of the accused to run in these persons, and there is evidence to show that desire was expressed.

I believe this incident about these witnesses having gone to Samdoli for the purpose for which they are stated to have gone. An incident of this kind cannot be easily made up. Further it is a significant fact that from the beginning accused 1 seems to have left a loophole for mentioning any four persons later on, because he referred to additional four persons who could not be recognized in the first statement which he made to the

Patil on 1st September, and it is quite clear that he did mention that because, in the note to the police Patil of Shigaon the police Patil of Samdoli did refer to this fact. Whether this statement about four persons, who were not recognized, was the result of a casual conversation between Dhondi Ramoshi and Mahadu, which is said to have taken place when the latter went to give information to the Patil, or whether it was due to any other consideration, the fact remains that six persons were specifically mentioned and four persons were mentioned generally. I have not overlooked the fact that accused 7 and the two Mangs had already made their statement and there was practical difficulty in mentioning these four names on 2nd September. But this difficulty was not known to others, and accused 11 seems to have been more anxious to cripple the opposition rather than to mention their names in threatening these witnesses into submission. The incident about these witnesses having been called to Samdoli seems to me to fit in with the reservation made from the beginning about four persons. I believe this incident to be true and it undoubtedly lends support to the prosecution case and is inconsistent with the defence theory.

I next come to the evidence which had been adduced on behalf of the prosecution relating to the innocence of the six persons whose names were specifically mentioned by Gangaram. As regards those six persons generally the case for the prosecution is that all of them were on terms of enmity with some of the accused, that one or the other accused had a grudge against each one of these six persons and that that was the motive for implicating them falsely. In fact they were at different places and could not have been at Samdoli Nalla on the night in question, and it is claimed for the prosecution that the evidence is sufficient to establish affirmatively the innocence of these six persons. It is also claimed for the prosecution that the motive on the side of each one of these accused persons for leading the attack on Dadu or even on Gangaram is very meagre and in the case of some, it is not shown that there was any motive or anything like the motive which the other side had. I shall deal with the evidence with regard

to the six persons briefly and on the evidence I feel satisfied, generally speaking, that in the case of each one of these the conclusions insisted upon by the prosecution are supported by the evidence in the case.

Bala Babaji, whose case I shall deal with first is a cripple according to the medical evidence. He cannot walk more than a furlong and whenever he has to go long distance, he has to go on horse-back. He has got corns on his feet: see Ex. 217. Thus it is difficult to understand *prima facie* how such a person could think of taking part at such a distance from his village in the attack on Dadu. His father, Babaji, was one of the six persons charged with the murder of Gangu and he was convicted. On the record of this case it is shown that accused 10 had some enmity with Babaji in connexion with certain civil proceedings. The evidence with regard to this is examined in detail by the Sessions Judge and the fact of the enmity has not been disputed before us. I do not think that all the exhibits, which the Sessions Judge has referred to are really necessary for the purpose of establishing the broad fact that accused 10 had feelings of enmity against Bala Babaji. There is the undoubted fact that Babaji was one of the accused in Gangu's case. That may afford a motive to Bala to entertain feelings against Gangaram and Shripati. But making due allowance for that consideration, it seems to me that on the medical evidence in the case his inability to participate in such an attack is established. Further it is said that he was at the time at Wading. This fact is sought to be proved by his own evidence, Ex. 236, Manjula, his sister, Ex. 243, and his brother, Krishna, Ex. 244. Undoubtedly this evidence as to alibi is apparently interested. But on a perusal of the depositions of these two witnesses I am inclined to believe them. If Bala Babaji was really at Wading, as is claimed for the prosecution, that is the kind of evidence which a person in his position could offer and no other, and in appreciating the alibi evidence in this case, as in other cases, that fact ought to be borne in mind. I am satisfied, therefore that the inculcation of Bala Babaji is shown on the evidence on the record to be untrue.

The next man, that I propose to deal with is Dadu Daji. On the record it appears that he had enmity with the approver, Nana. This fact of enmity has been dealt with by the Sessions Judge in para 17 of his judgment and I do not desire to examine it in detail. But it is difficult to understand why Dadu Daji should join in the attack on Dadu, the deceased. The evidence in the case, so far as it goes, supports the prosecution version that really his name was mentioned on account of enmity with Nana, the approver. But I am unable to discover any corresponding reason on his side to join the brutal attack on Dadu or even Gangaram. Dadu Daji has been examined in the case and he says that he left Shigaon on Friday, 30th August for Islampur where he wanted to go to get certain postal certificates cashed. He was there on Friday and on Saturday, and he says that he left Islampur in the company of several other persons and came to Shigaon in the afternoon of the 1st. There is considerable evidence as to Dadu's visit to Islampur, as to his stay on Saturday night at Islampur, and as to his leaving Islampur for Shigaon in the morning of 1st September.

If that evidence is believed, it is impossible that his inculcation by Gangaram in this crime could be true. There is the cash certificate which has been endorsed for the purpose of being cashed, but in fact the certificate was not cashed and he had to keep it with him. He returned to Shigaon with the certificate. This certificate is produced in the case, Ex. 63. In support of his visit to Islampur and his stay there during the material time there is the evidence of Bala Master, Ex. 182, and Tukaram, Ex. 185. The evidence of the Post Master is useful, as showing the general purpose of the visit of several villagers, in which Dadu Daji was included, to Islampur for getting the certificates cashed. Dadu himself, Ex. 216, Daulu Atmaram, Ex. 219, Rajba, Ex. 220, Mahadu, Ex. 221, Bahiru, Ex. 226, Dnyanu, Ex. 233, and Dnyanu Naga, Ex. 235, all these witnesses taken together prove the fact that on Saturday he was at Islampur, that he slept at a temple there and that he returned in the company of some of the villagers to Shigaon on Sunday. In connexion with this evidence the

defence have urged that it is not reliable. In the course of the arguments it was conceded, and in my opinion quite properly, that the evidence went to show that up to the evening of Saturday Dadu was at Islampur. But it was suggested that the evidence to show that he slept at Islampur and that he returned in the morning of the 1st from Islampur to Shigaon was not reliable and sufficient. It was suggested that he might have walked down from Islampur to Samdoli Nalla on the night of 31st. As I have already stated that the distance between Islampur and Samdoli Nalla is a little over 20 miles and I doubt whether Dadu Daji could have performed the feat which it is suggested he did perform. It is not explained in the evidence why he should attempt to do it and where and when he got the information that Gangaram, his brother, and the other members of the party would be at the Nalla on the early morning of 1st September. The evidence tends to show that the visit of Gangaram and his brother, Dadu, was really fixed upon on Friday the 30th August and it is in evidence that this Dadu had left Shigaon for Islampur on Friday. There is nothing in the case to show his association with the other five or any other source of information, and it seems to me on the evidence that the alibi of this witness, Dadu Daji, is abundantly established that the defence theory in this particular case must be taken to have been proved to be false. Of course that circumstance throws a serious doubt upon the general story of the defence. At the same time it must be remembered that because it is false in one particular, it is not necessarily false in all particulars and the rest of the story with regard to these persons must be examined.

Taking the case of Bala Chandra Bande, it is true that he is the brother-in-law of Dhondi Murari, and it is not an unfair suggestion that he may have had feelings of enmity against Shripati and Gangaram. At the same time the record discloses that accused 10 had some enmity with Bala Chandra Bande and the occasion of that enmity was, apart from some earlier proceedings between him and Bala Bande, that Bala Chandra Bande proved a sort of obstruction in the way of improper connexion that ac-

cused 10 had with a woman named Chandra distantly related to Bala Chandra Bande. The evidence as to the connexion between accused 10 and Chandra is ample. There are letters said to have been written by Chandra to accused 10 and on the evidence of Chandra I hold those letters proved. This connexion was disliked by Bala Bande, and under the circumstances we have a direct and immediate motive on the part of accused 10 to see that Bala Chandra Bande was run in. Bala had given evidence in the beam theft case against Gangaram. On the other hand, the motive suggested is that he was a relation of one of the accused persons in a previous murder case. Even assuming that in the matter of motive the position is fairly balanced on either side, we must consider the evidence as to whether Bala Bande did take part in this affair. We have the evidence of Bala, Ex. 198, his brother Hari Chandra Bande to show that he was at Shigaon. I do not say that this evidence of alibi is convincing but it may be said fairly that Bala Bande himself has been examined and subjected to cross-examination and that he is in a position to adduce evidence to show that he was far away from the Samdoli Nalla. There is also the evidence of Eknath (Ex. 201) to support the general story of his innocence.

The next man is Atmaram Bhau. As regards this young man, his name seems to have been mentioned according to the prosecution on account of Bhau's enmity with accused 8. He is not shown to have any kind of connexion with any of the accused, nor to have any grudge or feeling of enmity against any of them, except such as may be inferred from the fact of enmity between accused 8 and his father Bhau. It is important to remember that it was Atmaram's father, Bhau, who made applications to the authorities, after the first investigation was practically over, to have a second investigation; and there is evidence to show that he was in fact at Akhalkop at the time. Outside his own evidence, Ex. 211, there is the evidence of Kesho, Ex. 212, his own father Bhau, Ex. 213, and Sitaram, Ex. 215. Bhau's statement which was recorded before the Committing Magistrate, was accepted in evidence as he died after the committal proceedings and before the trial. The

evidence as to alibi, which I have carefully read, appears to me to be true. It may not be abundant evidence, but it is just that kind of evidence which a person in the position of Atmaram could adduce if he was really at Akhalkop. But this evidence, coupled with the initial improbability of this man being anywhere near the Samdoli Nalla on the night of 31st August or in the early morning of 1st September satisfies me that his name was falsely mentioned. It is important to note in connexion with Atmaram that Gangaram distinctly stated to the Patil as follows:

"Out of these Atma had an axe. He said to me throughout the life you pursued (persecuted) me. Can I release you now?' So saying he hit the first axe on the left thigh and Daji's son hit the stick on the right arm."

It is difficult to understand how this statement could have been made by Gangaram if he was disposed to have any regard for truth for Atmaram is not shown to have been ever persecuted by Gangaram. There is no suggestion on the record of the case as to how that statement attributed by Gangaram to Atmaram could be true.

The next man is Keshao Tatya. He had enmity with accused 10. He is the brother-in-law of Tatya Anna Desai who was one of the accused in Gangu's case, and he is also said to have enmity with accused 10. The first circumstance is relied upon by the defence as explaining his alleged attack on Dadu and the latter circumstance as explaining why his name was falsely mentioned. He also has been examined. His deposition is Ex. 202, and there are two witnesses examined to show that he could not be at the Samdoli Nalla. Those two witnesses are Dhondi Gopal, Ex. 205, and Dadu Tatya, Ex. 206.

The last man is Gulmya. Undoubtedly in the year 1918 differences and strong differences too, had arisen between Gulmya and Shripati, and in the matter of motive, without trying to differentiate too nicely, it may be said that Gulmya may wish to do harm to Shripati's party and Shripati may wish to do harm to him and those who were on his side. It is also true that Gulmya's antecedents are not good, and in the matter of antecedents he may be but on a par with some of the accused. But it does not appear on the record of this case that about this time, i.e., in 1918, when he

had severed his connexion with Shripati he was doing anything which could be said to be improper against Shripati. His helping Lakhu in the theft case is relied upon as showing his attitude towards Gangaram and his associates, including Shripati. But I am satisfied on record of this case that Gulmya helped the right side, and rendering assistance of that kind might be a matter of grievance only to those who did not like any complaint being made against them or their friends. It cannot be treated as affording any reason for holding that a person helping the right man would go to the length of what he is stated by the present accused to have done in this case. Taking the probability based upon motive to be equally balanced in his case, we have the evidence of Gulmya himself, Ex. 192, Bala Nidgiri, Ex. 191, and Gulmya's wife, Harni, Ex. 194. This evidence as to alibi may not be convincing and is not very strong. Though I feel satisfied in my mind as to the alibi of some of these persons, I admit that I do not feel so clear as to the alibi of some of these. But taking the bulk of evidence relating to these witnesses as to their alibi and as to their general relations with the accused it seems to me that the net effect is strongly against the defence and very much in favour of the prosecution case.

Here again the criticism that was offered was not so much for disbelieving any particular witness as for the general distrust of evidence of this kind, as it could be easily concocted. This general criticism is very useful in appreciating this evidence with caution, but it does not help us much in coming to a conclusion; and, in my opinion, it is quite impossible to ignore the effect of the bulk of the evidence relating to the six persons. The result is that the prosecution have offered all these six persons as witnesses to show that they were not at the Samdoli Nalla and further they have shown that as regards the initial probability as to their taking part in such an attack, the balance of probability is in favour of the prosecution theory and against the defence theory. On the other hand, there is nothing on the record to show either in the cross-examination of any of these witnesses concerned or anywhere else on the record that there was

any kind of general conspiracy among these six persons with or without some others. In the absence of any evidence of association among them, it is not reasonable to assume that there was such a conspiracy among those six persons as would lead to such an attack on Dadu. On the whole therefore I am satisfied that the prosecution have given all evidence which could reasonably be expected to show that none of these six persons was concerned in this crime.

These are the circumstances which all tend to point to one conclusion, namely that generally speaking, the defence theory is false and that the prosecution theory is true. These circumstances to which I have referred are very important in the case, not only as affording assurance to the other direct evidence to which I shall presently come, but also as showing that each one of these circumstances points to a conclusion against the defence. On the other hand, there is not a single circumstance of any real weight which can be said to have been proved in this case in favour of the defence theory.

I may refer here to the argument based on the delay in the present prosecution theory being put forward. Generally speaking, it was suggested on the very day by the mother of Dadu (Ex. 165). This is supported by the evidence of Bala Master (Ex. 182). I have already referred to the evidence of the Sub-Inspector of Palus to show that the theory was mentioned to him on 4th September, and to the telegrams and applications of the relations of the six persons to different authorities to show that that was the burden of their suggestions and statements. It is clear therefore that the present prosecution case was suggested almost simultaneously. Only the first investigation proceeded on the lines of the present defence theory. But that does not lend support to the argument based on the ground of delay.

Coming now to the direct evidence, as to the conspiracy on 30th August we have the evidence of the two approvers, Mahadu and Nana, the confessions of accused 1, 2, 3, 4, 5, 6 and 10 and evidence of Rama Satu, Bala Ashte and Santu Bagdi. As regards the approvers, I may mention here a circumstance which I should have stated earlier. In the first instance, these two persons were arrested as accused persons and they made their

confessions. The committing Magistrate offered pardon in a form, which is rather unusual and which may have proved embarrassing. As a result of this offer which was accepted by Mahadu and Nana, they were examined as witnesses in the case. Their evidence, generally speaking, is fairly detailed and is not in any material particular shown to be inconsistent with the first statements which they made. The evidence of Rama Satu (Ex. 190), Bala Ashte (Ex. 359) and Santu Bagdi (Ex. 174) is not on the whole more assuring than the evidence of the approvers. All these persons were present at the conspiracy and maintained silence, although they had knowledge of the conspiracy. This evidence however is such as can be reasonably expected in the case of such a conspiracy. We have the assurance as to conspiracy not only from these persons who are not free from taint as witnesses, but also from a fairly large number of accused persons who made their confessions in the first instance.

As regards the confessions, it is quite true that except in the case of accused 3 and 6 they have all been retracted; and retracted confessions naturally carry much less weight than confessions which have been adhered to. But as regards the general story of the conspiracy on the whole, I do not see any reason why the confessions which have been made by these several accused should not be believed, at least so far as they relate to their own presence at the conspiracy. In spite of this evidence, which is subject to certain infirmities, I have looked out for corroboration in the conduct of the accused; and generally speaking, I am satisfied that the subsequent conduct of the accused lends considerable support to the theory of conspiracy. For instance accused 9, 10 and 11 went to Samdoli. I do not desire to refer to this incident in detail over again, but their early visit to Samdoli on 1st September, coupled with the subsequent interest which accused 10 and 11 took throughout the first investigation and in the arrest of some of the accused, is more indicative of the truth of the story rather than otherwise. I am not unmindful of the consideration that if Gangaram was an associate of accused 10 and 11, the murder of his brother may naturally excite interest in accused 10 and 11 and

they may go and help him to a certain extent. I have given due weight to this circumstance and making due allowance for it, I still remain of the opinion that their conduct is indicative of the general truth of the story as to conspiracy and not indicative of the innocence of Gangaram and themselves, as suggested by the defence.

I shall now deal with the case of each of the accused separately. In spite of my general belief in the story of the conspiracy, in dealing with the case of each accused I desire to test the case against each accused with reference to his particular conduct.

As regards accused 1, it is an undoubted fact that he and his brother, Dadu, did go from Shigaon to Sangli Bazar on 31st August and they stayed at night at Sangalwadi. I have not so far mentioned the particular motive, which he had against Dadu. It is proved in the case that there had been quarrels between accused 1 and the deceased Dadu. They were two brothers and after Gangaram gave evidence in Gangu's case, there is evidence to prove that there were quarrels between them over the evidence given in Gangu's case. Dadu believed that Gangaram had given false evidence and he disapproved of Gangaram's conduct. It is needless to state this evidence in detail. It is said that the differences had led to their separation in living. There is also evidence in the case, which I believe, to show that the relation between Krishni, the wife of Dadu, and accused 1 were not proper. In making the suggestion at the 1st meeting on the morning of 30th August that his brother may be murdered, he was actuated not only by any motive common to himself and his associates but by some personal motive also. I am satisfied on the evidence that it was on account of these reasons that accused 1 offered practically to sacrifice Dadu. Dadu was an innocent and inoffensive man and he was misled and persuaded by accused 1 to accompany Gangaram to Sangli. This incident is proved by the evidence of Jija, Ex. 165, and other witnesses in the case. He was not himself willing to go to Sangli, but ultimately he did go there and there is no doubt about the murder of Dadu. Having regard to his conduct the evidence as to conspiracy seems to me to be amply corroborated. I have

no doubt that, as alleged by the prosecution, accused 1 was helpful in securing the murder of Dadu and was present at the scene of offence. I do not refer here to his other conduct about feigning to have received injuries, as I have already referred to it elsewhere. But taking his conduct as a whole into consideration, it leaves no doubt as to his being concerned in the crime. It can be said that but for him this particular murder could not have been brought about.

As regards accused 2, there is no doubt that he was a new associate of this company. He had joined apparently in 1918, and it does not appear on the record whether he had any personal motive in this murder. At least none has been mentioned pointedly in argument and I have not been able to discover any. So far as he is concerned, we have the evidence of the approver supported by the evidence of these three witnesses, Tukaram Patil, Santu Bagdi and Rama Satu, as to his presence. He has signed Ex. 230 which might show his association with Shripati. But in his case really when the evidence is analysed, it depends upon the evidence as to the conspiracy to which I have already referred and his own confession. He made his confession on 5th. He was arrested on 4th and there was no undue delay whatever in his making the confession. Though in the matter of direct personal motive and his conduct outside that disclosed in the evidence relating to conspiracy and in his confession there is nothing tangible against him, I am satisfied that the evidence as to conspiracy is sufficiently corroborated by his own confession, which even though retracted, I believe. There is also evidence which the Government Pleader has relied upon, to show that he left Shigaon on the evening of 31st with his other four companions; but that evidence is not any better than the evidence of conspiracy. After all the case against him is really proved by the evidence relating to the conspiracy and his confession. There are the confessions of the co-accused, particularly of those co-accused who have adhered to their confessions up to the end. I attach very little weight to the confessions of the co-accused which have been retracted at the trial. I need not state my reasons for that attitude in this

case. Even apart from the confessions of the co-accused, I am satisfied as to the guilt of accused 2.

Accused 3 has not appealed and we are not concerned with his case.

Accused 4 is in the same position as regards the nature of the evidence. But his case is different from the case of accused 2, in this sense that he did not take any part in the actual murder. He did not go to the Samdoli Nalla, and the part which was assigned to him by way of going to attend at Dadu's field on 31st August he failed to perform. But there is the evidence of Jija (Ex. 165) and Vithal (Ex. 308) to show that he did accompany Shripati when he went to persuade Dadu on the evening of 30th August to go with Gangaram to Sangli. On that evidence I am satisfied that on the evening of 31st August he did accompany Shripati to Dadu. It is quite true that he did not take any part in the persuasion. It is also true that he did not fulfil the function which was assigned to him on 31st August. In the shape of conduct or in the shape of personal motive there is not much against this accused. At the same time we have the evidence with regard to conspiracy which I have detailed and his own confession according to the evidence of the Police Inspector he was arrested on 9th. It also appears from that evidence that he was kept under a sort of surveillance at the village from 4th September. At one stage I felt some difficulty as to whether the case was sufficiently made out as regards accused 4. But on a consideration of all the circumstances I think that the conclusion reached by both the Assessors and the Sessions Judge in his case is also right. In reaching this conclusion necessarily his confession has to be considered, and in considering that confession I have not overlooked the fact that his confession was not made immediately after he was under the police eye. At the same time he was not under arrest before 9th and the evidence as to conspiracy shows that he was present at both the meetings.

As regards accused 5, it is quite true that he has not signed either of the two applications, Exs. 130 and 12. His confession stands more or less on the same footing and is subject to the same criticism as the confession of accused 4. There is a discrepancy in the evidence of

the two approvers as to his presence at the evening meeting on 30th. Giving him the benefit of the doubt arising in consequence of this discrepancy, I am prepared to hold that it is not shown that he was present at the evening meeting. But in his case there is a piece of conduct even more assuring than his confession. That piece of conduct is that he made a statement that five out of six persons who were originally charged by Gangaram were seen by him going towards Sangli on the night of the murder. It also appears from the evidence of the Sub-Inspector, Ex. 368, that he was cited as a witness when the charge sheet was sent. This readiness to support the defence theory is a clear indication of his intention to help the conspiracy and of his agreement required under the definition of conspiracy. It is no doubt a question of fact to be determined in each case as to whether the particular accused agreed with the other persons to do any illegal act. I am quite satisfied in this case that there was a general agreement in this morning to induce Dadu to go to the Samdoli Nalla in the manner already stated and to kill him there, and the statement made by him seems to me to indicate his desire to support the purpose for which the crime was organised. Though therefore as regards accused 5 at one stage I did feel some difficulty in coming to a conclusion adverse to him, I am satisfied on a consideration of the evidence that his guilt also is established.

Accused 6 has not appealed.

As regards accused 7, there is no doubt as to his conduct. He was present on the morning of 30th August and he left Shigaon for Arjunwadi and he met Gangaram and Dadu at Sangli on the afternoon of the 31st. The whole party, including accused 7, returned to Sangalvadi. He stayed separately, it is quite true; but in the morning he joined the party to return to Shigaon. His present case is that he lagged behind and that as soon as he heard a row, he ran back towards Sangalvadi as he was afraid of being deprived of the money that was with him. That is his case now and we are satisfied from the statement which he made on 1st September, and which has been admitted in evidence as being in favour of the accused, that this position was taken up by him on

1st September, soon after the offence. It also appears from the evidence that on the 1st he returned to Samdoli and stayed there. There is evidence to show that on 1st and 2nd September, he was there in company with Shripati and Balu Desai, accused 11 and 10, respectively. This shows he was throughout an agreeing party to the conspiracy. In his case there is the further charge as to his presence at the murder punishable under S. 302 read with S. 114. But in view of the statement which he had made on 1st September, we feel some doubt as to his presence at the scene of murder. No doubt if the approvers' evidence is to be believed, he was there as a helping and sympathetic associate. But there is conflict between that evidence and his statement, and on the whole it would not be safe to confirm his conviction with regard to his presence at the scene of murder. In his case therefore while I am satisfied that he was a member of the conspiracy to murder Dadu, the conviction under Ss. 302 and 114 ought to be set aside.

As regards accused 8, there can be no doubt on the evidence that he is one of the old associates of Shripati and there is evidence against him relating to conspiracy. Further there is the evidence of Ganu and Rau, to which I have referred as showing the presence of accused 8 at the time of this murder. He has not confessed and in his case there is the evidence relating to the conspiracy supported by the evidence of Ganu and Rau. It derives some support from the confessions of some of the co-accused. There is the evidence of a witness, Ex. 170, who is said to have seen him returning from the Samdoli Nalla to Shigaon in the morning of the 1st. That evidence is of such a type that it is difficult to place much reliance on it. I may mention here that there is some evidence to show that accused 8 was at Samdoli on 1st September in the evening. The presence of accused 8, though not deposed to by the Patil and Dhondi Ramoshi of Samdoli, is deposed to by Jija at Samdoli on the evening of the 1st. But in his case I rely mainly upon the evidence of conspiracy and the evidence of Ganu and Rau. I am satisfied that he was one of the persons who went to the Nalla and took part in murdering Dadu.

As regards accused 9, there is clear evidence to show that he was present at Samdoli with accused 10 and 11 on the evening of 1st September. Dhondi Ramoshi and Jija refer to his presence at Samdoli. That conduct, in my opinion, is consistent with his guilt and not consistent with his innocence. There is the other evidence against him just as there is against accused 8. Under the circumstances I am satisfied that accused 9 was concerned both in the conspiracy and in the murder.

As regards accused 10, there is the evidence as to conspiracy and there is his confession made on 7th February. He has no doubt retracted this confession and he has made a very long and detailed statement at the trial and made practically no statement before the Committing Magistrate. He is undoubtedly one of the associates of Shripati and possibly as good a leader of this conspiracy as accused 11, with whose case I shall presently deal. He was also present at Samdoli with accused 11 in the afternoon of 1st September and took active part in assisting the Investigation Officer. I do not feel any doubt whatever as to his guilt.

As regards accused 11, there is no doubt, on the evidence as to conspiracy and his conduct to which I have already referred, that he was a member of this conspiracy and in fact a leader of the conspiracy. It was to him, according to the prosecution case, that the five persons after murdering Dadu went to Shigaon; and then it was he who left Shigaon for Samdoli with some of the accused, even before the news reached the Patil of Shigaon. The evidence relating to the first investigation clearly shows that accused 11 took an active part in helping the Investigating Officer and, as it now appears, in misleading him. I need not re-examine his conduct. I am satisfied that the evidence as to his being a member of this conspiracy and as to his abetting the offence is true, and that he is guilty. I may add a word with reference to his plea that on 30th August (Friday) he had gone to Islampur. He made that statement for the first time at the trial after the whole evidence was recorded. There is practically no evidence in support of the plea: and the statement of Krishnabai of Islampur (Ex. 186) in cross-examination is too

vague to form the basis of any inference in favour of accused 11. I should not be prepared to rely upon her evidence in support of the plea of accused 11, and her statement, taken at its best, is wholly insufficient to establish that Shripati was at Islampur on that particular Friday.

This finishes the consideration of the guilt of the accused persons. The result so far is that except in the case of accused 7, the convictions of all the appellants must be confirmed. As regards accused 7, the conviction on the charge under S. 120-B must be confirmed, and that under Ss. 302 and 114 ought to be set aside.

As regards the sentences, in the case of those who have been sentenced to transportation for life there is nothing to be said. Whether a person is guilty of being a member of the conspiracy for the purpose of murdering a man or whether he otherwise abets the murder, he is punishable in the same manner. So in the case of accused 2, 4 and 5 the sentences for transportation for life must be confirmed. As regards accused 7, the sentence of transportation for life under S. 120-B must be confirmed; and having regard to our finding as to his alleged presence at the murder, the sentence under S. 302 read with S. 114 ought to be cancelled.

As regards these five accused who have been sentenced to death, the case stands on a different footing.

Accused 1 who for the sake of his personal ends offered his brother to be murdered, saw him murdered and in fact led him into a trap. There can be no doubt as to the appropriateness of the sentence of death passed on accused 1, Gangaram Hari Parit.

As regards the other four who have been sentenced to death, it seems to me that the case of accused 10 and 11 must be separately dealt with. As regards accused 10, he was undoubtedly one of the leading members of the conspiracy who actually accompanied the murdering party to the Samdoli Nalla and took an active part in murdering Dadu. According to the prosecution case which I accept, he was sent for the purpose of lending assurance to the other members who were sent to kill Dadu. The sentence of death passed on him seems to me to be appropriate. In the case of accused 10, Balu

alias Ramrao Hindurao Desai, I would confirm the sentence of death.

As regards accused 11, it is quite true that he did not go to the Samdoli Nalla to take part in the murder of Dadu: but in my opinion on the facts found he is as responsible as any person who went to the Samdoli Nalla and took part in murdering Dadu. In fact his responsibility to my mind is even greater. The whole conspiracy was hatched at his place, and was throughout supported by him. At every stage he helped the carrying out of the scheme, which was unfortunately conceived on 30th August. It is true that he is only liable to be punished under S. 109 read with S. 302, and not for the principal offence under S. 302. But in his case I feel clear that the sentence of death is fully deserved. I do not see any extenuating circumstance whatever in his favour and in spite of the fact that he did not take any actual part in the murder, I would confirm the sentence of death passed on accused 11, Shripati Bala Patil.

So far I have dealt with the three persons whom I consider the worst offenders in the crime.

As regards accused 8 and 9, they have been sentenced to death by the Sessions Judge. The record shows that these two persons were not leaders of the conspiracy but were led by men like Balu and Shripati. It is true that they took part in the actual murder of Dadu, but both in their subsequent conduct and in their general responsibility for this conspiracy, in my opinion, they occupy a somewhat different position from that occupied by accused 10 and 11. After all in case of this kind, where there are several persons concerned in the murder, in considering the question of sentence the Court has to draw a line; and in the interest of justice it will be quite fair to draw the line where I propose to draw it, namely, to sentence only those three accused whom I have mentioned to death and to sentence the rest to transportation for life. As regards accused 8, Sakharam Laxuman Patil, and accused 9, Dadu Govinda Patil, I would reduce the sentence of death to one of transportation for life in the case of each, and order it to run concurrently with that passed under S. 120-B.

I desire to add that though in this case there have been two separate con-

victions recorded under S. 120-B and under S. 302, read with S. 114 or S. 109, in the case of some of the accused, I do not desire to be understood as holding that that is necessarily the correct view. The point has not been argued and there is no practical importance of this point under the circumstances of this case. In the case of three accused (1, 10 and 11) we confirm the sentence of death, and in the case of the other accused who are appellants before us the sentence will be one of transportation for life. Whether there will be two such sentences of transportation running concurrently in the case of some of them or only one, the result is practically the same. It is in this view of the matter that I have not gone into the question as to whether a person could be separately charged and sentenced in respect of a conspiracy for murder in pursuance of the same conspiracy or for abetment of murder or with being present at the murder. I do not desire to express any opinion as to what the correct view on this point is. That must be considered when the question arises under circumstances under which it may have practical importance.

Before leaving this case I desire to add a word as to the second investigation carried on in this case. The investigation has been very full and helpful on many points connected with this case. In spite of the criticism urged on behalf of the defence, I am of opinion that the investigation discloses nothing which can be said to be improper or open to any objection. I am satisfied that the investigation was carried on promptly and efficiently, and there is nothing in the case to support the suggestion that it was not honest.

Crump, J.—The care and ability with which the learned Sessions Judge has dealt with this difficult case and the very full arguments which have been placed before us have lightened our labours, and in my own case the task is still further lightened by the judgment of my learned brother which has just been delivered. Yet though I concur in his conclusions, I think it desirable that I should record my reasons separately in view of the importance of the case and the grave interests involved.

Before coming to the facts which appear to me to be relevant to the present matter, I will say a few words as regards

the evidence on the record to which objection has been taken in the argument before us. What is known as Gangu's murder has no doubt a bearing upon the present case, but I am not sure that the learned Sessions Judge has appreciated that bearing in its true light. Voluminous evidence has been recorded to prove that the result of that case was a miscarriage of justice and that the false charge which led to that miscarriage of justice was manufactured by some of the present accused in order to involve their enemies. Now, as I understand the matter, Gangu's case is relevant in three ways. It is relevant by way of introduction or explanation to the facts of the present case, it is relevant in so far as along with other facts it discloses a motive, and it is further relevant as rebutting any inference which arises from any relevant fact in the present case. As regards the latter point, I consider that the evidence falls within the terms of S. 9, Evidence Act. We are here confronted with two rival stories as to the commission of the present crime and as those two rival stories are mutually exclusive, anything which tends to show that one is false, must necessarily go to prove that the other is true. The six persons, who were immediately implicated by accused 1 after the commission of the murder, are said to have absconded when it became known that their names had been mentioned by him as participators in the crime.

The fact of their absconding was conduct going to show that they were indeed concerned in the murder. Therefore anything which tends to explain their conduct, which furnishes a motive other than a guilty conscience, is clearly relevant under S. 9, Evidence Act. Now it is said that the falsity of the charge in Gangu's case was the motive which led these persons to abscond as soon as they were mentioned. But I think that idea does not correctly represent the real reason for their conduct. A motive is that which moves a man to do a particular act. It is that which is in his own mind which moves him to act, and whether the belief which produces that state of mind is true or false, the motive remains the same and the truth or falsity of the belief is not really in question. What has been done in the present case is to record in the course of the present trial a large

body of evidence to prove that the charge in Gangu's case was false and was inspired by the accused. But what we have to consider is the state of mind of these six persons on 1st September 1918 and the evidence does not really bear upon that state of mind unless it is shown that the evidence was known to these persons. Without such proof there is no logical connexion between the falsity of Gangu's case and the absconding of the six persons on 1st September 1918. It has not been sought to show before us that these six persons had access to the information which that evidence supplies and therefore so far that evidence is not, in my opinion, relevant for this special purpose. Indeed from the practical point of view it is quite unnecessary to consider whether the previous case was or was not a miscarriage of justice, because it can be shown without the least difficulty that there was a universal belief that such was the case, which in the village of some 2,000 inhabitants must necessarily have been shared by these persons who absconded. I will only allude briefly to the evidence disclosing that belief.

It will be found stated in the depositions of Krishna Babaji, Bhau Ganuji, Sakharam, Dnyanu Ramoshi and Gangaram and indeed in many other places upon the record, and it is clear that immediately after Gangu's murder that belief was openly asserted in a petition, Ex. 127, which has been since traced to the witness, Vishnu Petkar. Therefore if it is established as I hold it is, that that belief was prevalent and must in all probabilities have been present in the minds of those six persons, it is unnecessary further to consider whether in point of fact the conviction in Gangu's murder is right or wrong. In other respects I have nothing to add to the grounds stated by my learned brother as regards this matter except that where the Sessions Judge suggests that the evidence as to the falsity of that case was relevant as corroborating the confessions, it appears to me that he has omitted to observe that a confession is after all only evidence in so far as it bears upon the crime into which the Court is at the time inquiring and circumstances corroborating the confessions upon immaterial points are in themselves equally immaterial. I sympathise with the desire of the learned Sessions Judge to correct a miscarriage of

justice, but that is no reason for making any inquiry while the trial of another offence was going on unless that inquiry is on matters directly connected with the crime actually under trial, and where the learned Sessions Judge has argued from the similarity of the previous crime to the complicity of the same set of persons in this crime, I think he has clearly fallen into an error as explained by my learned brother in his judgment upon this point.

I now pass from this matter to the previous history of the relations between the accused inter se and their relations with many of those otherwise concerned in the present case since the year 1912. I do not propose to spend many words upon this matter, for it has been dealt with very fully already, and further, from my own point of view, I regard it, as furnishing very little aid to a correct conclusion in the present case. What in effect is shown beyond, I think, any possibility of doubt is that from 1912 downward a number of the accused persons were associated together in various matters and that for a considerable time the witness Gulmya was upon the same side. It also shows that they were hostile to many of the persons with whose case we are concerned on the alternative theory advanced for the defence. Three of the six persons originally implicated in this case are related to those who were convicted of the murder of Gangu, that is to say, Bala Babaji, Bala Chandra Bande and Keshav Tatya, and Bala Chandra Bande is also said to have quarrelled with accused 10 in connexion with the woman Chandra Bhasar, whose story I believe and which story goes to show that this Bala Chandra Bande interfered in the relations between accused 10 and this woman and this interference was aided by the witness Gulmya. There is also clear proof that accused 8 and Bhau, the father of Atma, one of the six persons implicated had quarrelled over some property and that Bhau had supported a widow named Gojra as against accused 8, and that accused 8 was convicted in the case arising out of those proceedings. It is further in evidence that Dadu Daji, another of the six persons implicated had brought about an adoption which adversely affected the interests of the approver, Nana.

Five therefore out of those six persons had grounds for enmity against some or other of the accused and some of the accused likewise had grounds of enmity against them. As to the special case of the witness Gulmya, I do not find it necessary to add anything to the observations in para. 40 of the judgment of the learned Sessions Judge. These facts appear to me to be established and they appear to show that Gulmya, who was originally an associate of the accused persons, fell out with them in the course of the year 1918 and that this disagreement led to active hostility and that in particular as regards what is known as the "beam case." Gulmya interfered actively on behalf of the complainant, Lakhu Jadhav, and that it was through his agency that the complaint was in fact lodged. It is clear that in spite of the attempt to compromise on the part of the accused a compromise which was I hold, imposed upon Lakhu Jadhav by threats the case owing to the action of the Deputy Superintendent of Police, was proceeded with on 25th August 1915, and an order was issued for the arrest of accused 1. At or about the time with which we are now specially concerned there is evidence to show that accused 1, 7, 8, 9, 10 and 11 were arrayed on one side as against the relatives of persons convicted in Gangu's case and the six persons whom they sought to implicate with reference to the present crime. Thus there clearly was motive, but that motive may be interpreted in either direction, and therefore in judging of the truth of the alternative theory placed before us I do not think that the motive is of such special importance as to require any further discussion on my part.

I may say here that I propose to confine myself to what appears to me to be more important parts of the case. To my mind the truth as to the facts of Dadu's murder must be sought mainly in the evidence as to what took place at the time, and the surrounding circumstances are after all of only secondary importance. I come therefore now to the murder of Dadu on 1st September 1918. Apart from the identity of the murderers there is no dispute as to the place and manner in which the death of Dadu was caused. As to the time, I have scrutinised the evidence bearing

upon that point and it appears to me probable that the murder took place very shortly before sunrise on the morning of 1st September. The sun rose on that day at about 6 a. m. and Mahadu, who was sent to communicate the news of the crime, reached Samdoli after daybreak. Therefore at the time of the murder the sun must have been not far from reaching the horizon. The evidence of Ganu goes to show that they started from Sangalwadi before sunrise and when the sun rose he was at Dudhgaon, which is four miles from the scene of murder. This witness also says that faces could be distinguished and the approver Mahadu says that it was almost daybreak and that it was dawn when they reached the scene of the offence. It seems therefore that there was probably sufficient light to distinguish facts with some clearness at short distances. I have alluded to this matter as bearing upon the possibility of Dadu having been killed by mistake for his brother, accused 1. If the statement of accused 1 be examined, I think that that possibility must be excluded for the version that he himself puts upon the matter and the state of the light at the time renders this improbable.

Before I come more closely to the evidence as to the murder, I should like to say that here we have two theories. No third theory is advanced and if it is shown that the six persons, who were in the first instance charged with this crime, could not in all human probability have committed it then there is a very strong probability that it was committed by those persons who made that false report and who by their own admission are cognizant of the facts and were present at the scene of the murder. Therefore I will examine the evidence briefly from that standpoint.

The first point and the most important point in my opinion is the very trifling and superficial injuries inflicted upon accused 1. According to the theory of the defence the object of the attack was to murder him, and according to his own story he was in front of the party which was attacked, and two men, who were perfectly aware of his identity, Atmaram and Dadu Daji fell upon him obviously with an intention of causing his death. These persons according to his

own story were armed with axes, and yet the injuries which were inflicted upon him were merely six superficial scratches and one not very serious contusion on the right shoulder. That is in itself a circumstance which naturally leads me to regard his story with considerable suspicion and that suspicion is increased when the details of his statement are carefully perused. Allowing for any possible agitation of mind or any want of clearness of expression, I think that if that statement be carefully read, it will be seen at once that it does not account in a satisfactory manner for the death of the murdered man Dadu. Two persons he says attacked him but why they left him after these trifling injuries were inflicted is by no means clear. Then he says that he looked back and saw all these persons attacking Dadu and that he then fell upon the ground and that the accused departed thinking that accused 1 himself was dead. That does not appear to me a probable story and the words which he has put into the mouth of the man Atma and which my learned brother has commented on appear to me to increase the improbability, when it is borne in mind that the record furnishes no explanation why Atma should have used such words. Therefore I regard that story with suspicion, and if in connexion with that story we read the evidence which goes to show that the six persons so charged were in all human probability not upon the scene of the offence, the conviction becomes almost a certainty that the story originally told by accused 1 was a false story.

I do not propose to deal at length with the evidence what is termed the alibi. But this much I may say that there is voluminous evidence to show that Dadu Daji was in fact at Islampur on Saturday and Sunday and that evidence appears to me to be worthy of credit. Further that there is reliable evidence showing that Bala Babaji was physically not perhaps incapable, but so disabled as to render his presence at the crime extremely improbable. This coupled with the evidence as to the alibi of the other persons leads me to believe that they did not take part in the murder in the manner alleged. I may point out that though the evidence as to alibi in the case of those persons other than Dadu Daji is somewhat weak nevertheless if the story

as to Dadu Daji is accepted and if the incapacity of Bala Babaji is as I have described, it seems to me that the Court may safely accept the story as proved as regards the four other persons also. Thus I have little doubt that immediately after the murder a false story was told and the object of that false story must have been to implicate the six persons who were then named as the perpetrators of the crime. Along with the evidence pointing to accused 1, as being concerned in the murder, I would read the evidence which goes to show that he was not on good terms with his brother and that therefore it is not improbable that he should have been a consenting party to this murder even though that murder was probably only a secondary motive in the commission of this crime. Upon this point the evidence of Jija, Krishna Sakhran Hari, Mukta, Keshav Naiku, Vithal Tukaram and Yamuna appears to me, when read, to be reliable and to establish that these two brothers were not upon good terms. That being so, why did accused 1 and Mahadu tell this false story? It appears to follow as a necessary inference that they themselves were in some way concerned in the murder of Dadu. It does not follow that the other accused were concerned. For evidence as regards them we must look elsewhere and I will now come to that portion of the case which bears more materially against them. I would here say that I agree with my learned brother that we have in this case an honest and straightforward investigation and an investigation which, in my opinion, was conducted with great ability. We have also the evidence of the Magistrate before whom the confessions of the accused persons were recorded, which goes to show that every care was taken to see that no improper pressure was put upon these accused. Therefore it seems to me, at least as far as accused 1, was concerned safe to accept his confession, and as regards the confessions of the other accused, unless there is something in the evidence which conflicts with those confessions I see no reason why those confessions should not be acted upon even though they were retracted at a later stage of the trial.

The next point which I would note as bearing upon the perpetrators of this crime was the evidence which goes to

show that certain of the accused persons left Shigaon and proceeded to Samdoli before they could have known in the ordinary course that the murder of Dadu had been committed. That they went in connexion with that murder is not disputed, and if they are unable to explain for what reason they went, then it would appear to me a reasonable inference that they were in some way concerned with the facts leading up to his death. Those accused persons are 6, 9, 10 and 11. Accused 9 and 10 are mentioned as being present at Samdoli, by the witness Dnyanu Ramoshi, and Jija says accused 7 to 11 were also present at Samdoli when she arrived there. As to accused 8 she is probably mistaken, for there is no other evidence upon this point and the statements of the approvers mention accused 6, 9, 10 and 11 only. The question is whence these persons got their knowledge of the murder which had just been committed. Their own story is that they derived that knowledge directly from the official report sent by the Police Patil of Samdoli to the Police Patil of Shigaon.

Now the Police Patil of Samdoli, who is not shown to be biased against the accused, states that he sent his report at 10 o'clock in the morning. He also states that these accused were in Samdoli about 1 o'clock. If that be true, they could not have started after the official intimation reached Shigaon, for the distance was about 10 miles. That the report should have been sent off at about 10 a. m. at the earliest appears to me consistent with all known facts of the case, for it bears internal evidence of its having been written after the statement of accused 1 was recorded at the scene of offence, and it is therefore not probable, having regard to the dilatory manner in which such investigations are conducted, that it should have been despatched immediately. The Mahar woman who took the report also states that it was sent at a time which corresponds roughly to 10 o'clock in the morning, and she further says that she met accused 10 and 11 and others upon the road while she was carrying that report and that she reached Shigaon at 2 o'clock in the afternoon. As to the arrival of the report at Shigaon, she is corroborated by Bala Master who was then the Patil, and I see no reason, why

his evidence should not be accepted. It seems to me, therefore to follow that the accused persons left Shigaon before that report arrived and therefore they must have had a source of knowledge which they had not disclosed.

[Note.—The rest of the judgment is not material for the purposes of this report.—*Ed.*]

G.P./R.K.

Convictions upheld.

A. I. R. 1920 Bombay 400

MARTEN, J.

Weld & Co.—Plaintiffs.

v.

Sher Ahmed Ekbal Ahmed and Haji Karim Elahi—Defendant & Third Party.

Original Civil Suit No. 1170 of 1916,
Decided on 21st June 1919.

Costs—Costs how to be assessed in third party proceedings stated.

Where a decree is passed against a defendant in a suit and the defendant then succeeds in third party proceedings his costs of the suit should be taxed as against the third party as between solicitor and client and the costs of the third party proceedings as between party and party. [P 401 C 2 ; P 402 C 1]

Judgment.—The last point argued in this case is whether the costs of the defendant as against the third party ought as to any, and, if so, what extent to be paid as between solicitor and client.

Mr. Setalvad at the outset disclaimed any intention to ask for costs between solicitor and client. In case this judgment comes before any Judge who is unfamiliar with the Bombay practice as opposed to the practice in England, I would say that that observation has reference to what I believe to be a peculiarity in these Courts of drawing a distinction between "costs as between solicitor and client" and "costs between solicitor and client," the former being more in the nature of what in England are costs on a higher scale, and the latter being the fullest possible indemnity and which I rather gather in this Court admit of very little, if any, real taxation. I need not dwell on that, because, as I have said, Mr. Setalvad confines his case to costs as between solicitor and client.

As regards the order to be made, Mr. Setalvad asks me to follow the form which was adopted by Romer, J., as he then was in *Trafalgar Co., Ltd. v. Francis* (1) which will be found in Seton 6th Edn., Vol. 3, p. 2142, Form No. 12, and similarly at p. 2072 in the 7th Edn.

(1) [1892] B. 758.

It will be noticed that at the bottom of that form is a note to this effect:

"A motion to vary the minutes of this order as regards solicitor and client costs given against the third party was refused."

The precise form of the order was

"and as to the question of indemnity, declare that the defendant is entitled to be indemnified by the said A B, against all amounts payable by him under this judgment and let the defendant recover against the said A B any amounts so paid by him and his own costs of this action and of the third party proceedings to be taxed, etc., those of the action as between solicitor and client, but having regard to the fact that they are payable by the third party."

It will be seen there that the defendant's costs of the action are directed to be taxed as between solicitor and client and his costs of the third party proceedings as between party and party. That form of order has been followed in Ireland by Vice-Chancellor Chatterton in *Wiley v. Smith* (2.) It will also be found that in *Hartas v. Scarborough* (3) Wills, J., made a somewhat similar order, that is to say, he gave what corresponds to the defendant here, his costs of the action as between solicitor and client. Another instance of solicitor and client costs being given is a decision of Farewell, J., in *Hooper v. Bromet* (4) which was reversed on another point in *Hooper v. Bromet* (5) and also in *G. W. Ry. v. Fisher* (6), a decision of Buckley, J., in *Born v. Turner* (7), a decision of Byrne, J. I do not say that all these cases are cases of the third parties, but they are cases where persons who in effect were entitled to an indemnity were given solicitor and client costs by the Court.

Now the decision on the other side is a decision in the King's Bench Division of Kennedy, J., as he then was in *Maxwell v. British Thomson Houston Co.* (8). That was the case of an indemnity against proceedings for negligence and there Kennedy, J., said:

"It seems to me in the absence of authority to the contrary, that a person who is indemnifying another against the costs of an action cannot unless there are some special circumstances, be called upon to pay them as between solicitor and client. He must pay them as

between party and party, but I do not think he is bound to pay more."

The reporter's note however at the foot of the judgment refers one to the above form in Seton and adds:

"The attention of the Judge was not called to this at the time, but his Lordship has since brought it to the notice of the reporter."

Now this case of Kennedy, J., is perhaps, on the facts, rather different to the class of indemnity case one has to deal with here. But however that may be, it is to my mind most material that the learned Judge's attention was not drawn to Lord Romer, J.'s order nor to the form in Seton. As to this I must emphasize the fact that Seton is rather more than a mere ordinary text-book in the Chancery Division in England. It is a book that is in constant use there by Judges and counsel and also by the Registrars, whose duty it is to draw up the orders of the Court. Therefore it is likely that any error will very soon be brought to the notice of the Court. It seems to me with great respect to Kennedy, J., that as far as the authorities go, the balance of authority is in favour of giving costs, in a case like this, as between solicitor and client.

Then, if we turn and consider the matter from the point of view of discretion I think that this balance of authority agrees with common fairness. Take the present case. To my mind it is clear that the liability on these cotton contracts as between the defendant and third party as from 21st May was on the third party and not on the defendant, and that the third party was to find all moneys necessary for financing these transactions. Why then if the defendant, acting in effect under the directions of third party and in effect as his agent incurs personal liability for the benefit of the third party, why should he be left out of pocket, because the third party omits to carry out what he had promised to do, namely, to keep the defendant in funds. The result is that the defendant is sued and has to pay the costs of the action brought by the plaintiffs. If I said that the defendant can only recover his party and party costs of that action, it would leave him with the difference between party and party costs and solicitor and client costs, which he would have to pay his own solicitor. In other words, the third party would gain to this extent, that if he himself had been sued

(2) [1894] 1 Ir. R. 153=1 Ir. L. R. 78.

(3) [1899] 83 Sol. J. 661.

(4) [1903] 89 L. T. 27.

(5) [1904] 90 L. T. 284.

(6) [1905] 1 Oh. 316=74 L. J. Oh. 241=92 L. T. 104=53 W. R. 279.

(7) [1900] 2 Oh. 211=69 L. J. Oh. 593=89 L. T. 148=48 W. R. 697.

(8) [1904] 2 K. B. 342=78 L. J. K. B. 614.

directly, he would have to pay his own solicitor and client costs but that as the defendant is sued, he can escape with party and party costs. What he is asking me to do is this: that because he used a cat's paw he should only pay party and party costs and he allowed to make the cat's paw viz., the defendant, pay the difference. I do not see any fairness in that. The costs of the third party notice itself seem to me to stand on a different footing. Treating the notice as a separate suit, the costs will follow the ordinary rule that a litigant even though successful only recovers party and party costs. That no doubt, is the reason for the distinction drawn in Seton between the costs of the original action and the costs of the third party notice.

The right order in my opinion on this question of costs is to follow the above form in Seton, and I accordingly make my order in the term of that form.

As I have already said, the decree must be shown to me before it is passed and entered.

G.P./R.K.

Order accordingly.

A. I. R. 1920 Bombay 402

SHAH AND HAYWARD, JJ.

Rahimatalli Mahomedalli Mulla —
Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 324 of 1919, Decided on 30th September 1919, from convictions and sentences passed by Second Presidency Magistrate, Bombay.

(a) Penal Code (45 of 1860), Ss. 153 and 43—Publication of pamphlet written in provoking style and defamatory is illegal—Riot likely—Distribution of pamphlet is offence under S. 153.

The publication of a pamphlet (the subject-matter of which leaves no doubt as to the identity of the persons against whom the writing is directed) written in a very provocative style defamatory of certain persons furnishing to them ground for a civil action would be illegal according to S. 43, Penal Code, and as the natural and probable result of reading such a pamphlet would be to give provocation to the readers the person connected with the pamphlet may properly be said to have intended that such provocation would cause the offence of rioting to be committed and the distribution of the pamphlet would render the person concerned liable to punishment under S. 153.

[P 405 C 1, P 404 C 2]

(b) Penal Code (1860), S. 292 — Test for determining obscenity laid down.

In determining whether a pamphlet is obscene within the meaning of S. 292 the test to be applied is whether the tendency of the mat-

ter charged as obscenity is to deprive and corrupt those whose minds are open to such immoral influences. In each case the question is one of fact.

[P 405 C 1]

R. D. N. Wadia and *D. K. Bhawe* —
for Appellant.

Mirza and *Public Prosecutor* — for
the Crown.

Shah, J.—The appellant before us is one Mulla Rahimatalli Mahomedalli. He was charged before the Second Presidency Magistrate under Ss. 153 and 292, I. P. C., in respect of three writings (*Yazidki Id*, marked A, *Sharafalli Mamoojika Mercia*, marked C, and *Khare Dajjilka Matoom*, marked G). Exs. A and C are said to have been published on or about 11th and 12th July 1918 respectively and as regards Ex. G it is said that the offences were committed on or about 9th August 1918.

The trial Magistrate after a prolonged inquiry came to the conclusion that the accused was guilty under Ss. 153 and 292, I. P. C. in respect of Ex. A (*Yazidki Id*); that he was guilty under S. 153 in respect of Ex. C (*Sharafalli Mamoojika Mercia*) and that no offence was established in respect of Ex. G. The result was that the accused was convicted under Ss. 153 and 292 in respect of "*Yazidki Id*" and sentenced to pay a fine of Rs. 1,000, only one sentence being passed in respect of both the offences under Ss. 153 and 292, that he was convicted in respect of the pamphlet *Sharafalli Mamoojika Mercia* under S. 153 only and sentenced to pay a fine of Rs. 1,000 and that he was acquitted in respect of the charges connected with the pamphlet "*Khare Dajjilka Matoom*." An order was made under S. 106, Criminal P. C., ordering the accused to be bound over to keep the peace for one year in the sum of Rs. 500 with one surety for the like amount.

The accused has appealed to this Court against these convictions and sentences and it is urged in support of the appeal that Ex. A does not in any way offend against the provisions of Ss. 153 and 292, that Ex. C does not offend against the provisions of S. 153, I. P. C., that the accused is in no way connected with Exs. A and C, and that he is no way responsible for the writing or for the printing of these pamphlets, nor for their distribution.

Before dealing with these contentions it will be convenient to set forth briefly the circumstances which led to the initiation of these proceedings against the accused. Somewhere in 1917, apparently there was some difference among the Dawoodi Bohras as to the exact position which their Head Priest occupied. The large majority of them accepted him as Daie-ul-Mutalak, but the small minority, including the present accused refused to recognize him as Daie-ul-Mutalak, though they did not refuse to recognize him as their Head Priest only as "Nazeem Daie." These differences were apparently acute. In this appeal we are in no way concerned with the merits of this religious controversy between the large majority and the small minority of the Dawoodi Bohras.

About the end of July 1917, the Head Mullaji Sahab pronounced against this small minority a sort of anathema by declaring "Salam Band," indicating thereby a kind of social and religious excommunication. Soon after this in August 1917 a suit was filed by the Advocate-General against the Head Mullaji Sahab and others for accounts and for the appointment of proper trustees in respect of Chandabhoy's mosque and a certain charity box known as Shet Chandabhoy's Galla and other reliefs appropriate to a suit under S. 92, Civil P. C. Among the persons against whom Salam Band was pronounced was the late Mr. Sharafalli Mamooji. In December 1917, he initiated proceedings in the Court of the Chief Presidency Magistrate against the local deputy of the Head Mullaji Sahab and others under Ch. 8, Criminal P. C. These proceedings terminated in February 1918 without any security being taken from the opponents of Sharafalli Mamooji. In July 1918 several other suits were filed by different persons against the Head Mullaji Sahab. One of the suits was filed by the accused to recover damages to the extent of Rs. 50,000, for a declaration that the Head Mullaji Sahab was not the Daie-ul-Mutalak and for a declaration that the defendant had no authority to expel him from the Mahomedan religion or from the Ismail Dawoodi Firka and other incidental reliefs. Similar suits for heavy damages were filed by the sons of the Late Sir

Adamji Peerbhoy about the same time. All these suits had their original in the order made by the Head Mullaji Sahab as to "Salam Band" against the plaintiffs in these suits. These suits are still pending and we are not concerned in the slightest degree with the merits of these claims. In August 1918, a suit was filed by the Official Assignee against the Head Mullaji Sahab. It is common ground that all these suits are filed against the Head Mullaji Sahab by or at the instance of those who have been excommunicated.

I have stated these facts with a view to show the extent of estrangement between the Head Mullaji Sahab and the large majority of the Dawoodi Bohras on the one hand and the small minority including the accused and the sons of the late Sir Adamji Peerbhoy and a few others on the other. Sharafalli Mamooji died somewhere in the early part of the month of Ramzan in the year 1918. The case for the prosecution is that one Ravi Ajmere wrote Exs. A and C at the instance of the accused that the accused employed one Sayed Zainul Abadin about the end of June 1918 in order to attend to the accused's work of printing, that he arranged to have these two pamphlets, A and C, printed in the litho press called the Shri Ram Press owned by the witness Ramchandra, that 500 printed copies of Ex. A were taken away from the press on 8th July and about 1,000 printed copies of Ex. C were taken away from the press on 7th July. It is also a part of the prosecution case that this Sayed got the subject-matter of Ex. C written on a litho paper by the witness Mahomed Abdul Hakim that he wrote Ex. A himself on the litho paper that these litho papers were duly transcribed on the stones and the printed copies prepared in the Shri Ram Press. Ex. A does not mention the name of the press or of the publisher and Ex. C mentions the name of the press and a false name of the publisher. The pamphlet Yazidki-Id is said to have been sent to some of the members of the Dawoodi Bohras on the side of the Head Mullaji Sahab on the Ramzan-Id (11th July 1918). The language used is Urdu and it is printed in Arabic character. The pamphlet C was sent to some members of the same section a day later. Some persons who are on the side of the Head

Mullaji Sahab arranged to get these two pamphlets translated and ultimately a complaint was lodged before the police on 10th August. On this information an investigation was made by the Criminal Investigation Department. The three presses, viz. the Shri Ram Press, the Shri Krishna Press and the Chitrottejaka Press were searched and certain articles said to be connected with Exs. A and C were taken possession of.

It is needless to state the facts relating to Ex. G as the accused has been acquitted in respect thereof and in this appeal we are not concerned in any way with Ex. G. On the 12th the accused went to the police and he was arrested there and when his room was searched on that day Ex. B was found there. This Ex. B is the manuscript of a part of the pamphlet Ex. C. Ultimately, the accused was charged before the Magistrate on 21st September 1918.

The defence is that, according to the true meaning of the expressions and the words used, the pamphlets are not objectionable, and that the accused is in no way connected with either of the pamphlets and that the pamphlets have been written by one Ravi Ajmer probably at the instance of somebody from the large majority of the Dawoodi Bohras with a view to create trouble against him, as there was a considerable estrangement between the two parties on account of the suits filed against the Head Mullaji Sahab and in consequence of the keen difference that had arisen as to the religious position of the Head Mullaji Sahab.

Coming to details, it is urged for the defence that the accused, who is a Mulla, living in the sanitarium of Sir Adamji Peerbhoy, purchased the Yahia Press in April 1918, that the press was not in a proper working order, that he wanted to get a pamphlet admittedly written by him called "Sadaye Hak" printed, and that with that view he engaged the services of Sayed as a commission agent to look after and arrange for the printing of the pamphlet "Sadaye Hak" and that he was not employed by him as a servant on monthly wages. The printing of the Sadaye Hak was to be done in the Shri Ram Press and the Shri Krishna Press, and that his visits to the Shri Ram Press in July have been used falsely for the purpose of connecting him with the printing of the pamphlets A and C, which was

really the work of the witness Sayed on his own account. It is also urged on his behalf that Ex. B, the manuscript of a part of Ex. C said to be in the handwriting of Ravi Ajmer, was really not found in the room occupied by him in the sanitarium, but was put in by some enemy of his among the papers found in his room.

The appeal has been very fully argued before us and we have considered the arguments on both sides. The contention that Ex. A does not offend against the provisions of S. 153, I. P. C., must be disallowed. The lower Court has dealt with this document in detail, and before us it has not been seriously contended that the language is not objectionable, though it is urged that the translation prepared by the High Court Translator is not accurate.

It is urged however that it is not of such a character as to bring it within the scope of S. 153, I. P. C. Ex. A consists of about seventeen stanzas: is written in Urdu verses: is called Yazidki Id, and the subject-matter of the pamphlet leaves no doubt as to the identity of some of the persons against whom the writing is directed. It was written apparently on the occasion of the Ramzan Id. I do not propose to cite any passages from this pamphlet to show that it is really written in a very provoking style; and the followers of the Head Mullaji Sahab, who may be expected to understand the references against him and other persons, may be considerably provoked by a writing like Ex. A. The act of publishing it would be illegal according to S. 43, I. P. C., as it is defamatory of certain persons and would furnish ground for a civil action to those persons. Anyone who wrote it and distributed it did so malignantly or wantonly; and when we have regard to the fact that copies of these pamphlets were sent on the Id day to some of the followers of the Mullaji Sahab, the natural and probable effect of reading it would be to give provocation to the readers. The intention of the persons distributing or helping the distribution of these pamphlets could be gathered only from the language used in the pamphlets, and judging of his intention from the natural and probable effect of the writing like Ex. A, it seems to me that the writing is of such a character that the person connected with the pamphlet

may properly be said to have intended that such provocation will cause the offence of rioting to be committed. In coming to this conclusion no doubt the ordinary peaceful character of the Dawoodi Bohra community should be taken into account. At the same time their reverence for the Mullaji Sahab also should be properly borne in mind. Both parties before us have relied upon the Bombay Gazetteer, Vol. 9, Part 2, for the general information about the Dawoodi Bohras in this Presidency. Under the heading of "trading communities" the Bohras are mentioned first, and among them the Dawoodi Bohras are referred to at pp. 28 to 32. It will be enough to state here that

"their home-tongue is Gujrathi, marked by some peculiarities of dialect and the use of several Arab words well pronounced even by women who have not learnt Arabic; that they are largely a trading community, and that, short of worship, the Head Mulla is treated with the greatest respect."

This pamphlet is written in the Urdu language and in Arabic script, which could be read by many of the Dawoodi Bohras and understood by almost all of them. Having regard to the state of things as it existed at the date of this publication, it seems to me that Ex. A is a pamphlet the distribution of which would render the person concerned liable to punishment under S. 153. It is true that no riot has been committed and that the case falls under the second part of the section.

It is urged however that the distribution of this pamphlet is not punishable under S. 292, I. P. C., because it is not an obscene pamphlet within the meaning of the section. It seems to me that there is great force in the argument. Having regard to the test of obscenity as accepted in *Empress v. Parasharam Yeshwant* (1) and *Emperor v. Vishnu Krishna* (2), it is difficult to say that the pamphlet is obscene. No doubt there are two or three verses which may be treated as obscene in the ordinary acceptation of the word; but applying the test whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, it is not easy to treat the publication as obscene. In each case really it is a question of fact. The ques-

tion is not of any practical importance in this case, as there is no separate sentence for this offence. Taking the general tenor of the pamphlet and considering also the particular parts objected to as being obscene, I am not prepared to hold that the pamphlet is obscene. I should say that its leading characteristic is that it is provoking.

The other pamphlet, Ex C, with reference to which the accused is convicted only under S. 153 stands on a different footing. As pointed out in *Empress v. Kahanji* (3) the question which we have to decide is whether:

"the language used in the (pamphlet) does in the sense which fairly belongs to it—the sense that is most natural and obvious—bear the meaning put on it by the Magistrate. We have to look at the circumstances of the case and the occasion and the time. We have to consider the whole poem, giving its proper weight to every part."

The occasion of this pamphlet, which is called "Sharafalli Mamoojika Mercia," was the death of Sharafalli Mamooji which had taken place apparently a few days before. He was one of those few who were excommunicated, and it appears from the pamphlet—and the fact is not denied either in the evidence or in the arguments before us that considerable trouble was experienced by the minority on the occasion of his funeral. It is stated that his dead body had to be carried in a motor car and the police had to be kept present on the occasion of the funeral at the burial ground. Under these circumstances this Ex. C appears to have been written. It is an elegy on the late Sharafalli Mamooji, as the name of the pamphlet clearly shows. It consists of 64 verses with some side notes by the writer. It extols the virtues and services of Sharafalli Mamooji as the writer understood them, and he has compared his funeral with the funeral of Imam Hasan, the grandson of the Prophet. We are not concerned with the appropriateness of the comparison; but to an admirer of the deceased it cannot be said that it was not open to write about him in the manner in which the Mercia is written. The first half of the pamphlet is not objected to before us. It is urged however that in a fairly large number of verses in the latter half of the pamphlet very strong language is used with reference to the followers of

(1) [1896] 20 Bom. 193.

(2) [1913] 19 I. C. 504=14 Cr. L. J. 248.

(3) [1894] 18 Bom. 758.

the Mullaji Saheb and that the objectionable words like "Yazid" and "Dajjal" are used with reference to the Mullaji Saheb himself. The learned Magistrate has given a list of the objectionable words. But if the pamphlet is taken as a whole, and if the parts objected to are considered in relation to the subject-matter of the pamphlet, it seems to me that the main object of the writer is to extol Sharafalli Mamooji and no doubt to condemn those who, according to the writer, created trouble on the occasion of his funeral and were opposed to him. The words like "mischief-mongers," "pig" "hog" and "ass" are used with reference to those who, according to the writer, organized and created trouble on the occasion of the funeral.

If these verses are fairly read, it seems to me that the condemnation relates to those who created or intended trouble on the occasion of the funeral of Sharafalli Mamooji and not generally with reference to the followers of the Mullaji Saheb. I do not say that the word "Yazid" is not used with reference to the Mullaji Saheb at any place, but generally speaking it is capable of being read as referring to the leader of that group of persons who wanted to create trouble on the occasion of the funeral. There is nothing in the case to show, nor is it suggested on either side, that the Head Mullaji had anything to do with the opposition displayed by some of his followers on the occasion of the funeral of Sharafalli Mamooji; and it is clear to my mind that where the writer refers to the trouble created on the occasion of the funeral, the reference cannot be to the Head Mullaji Saheb, but to the leader of those who created trouble on the occasion. Viewed in that light it seems to me that the pamphlet is capable of an innocent reading. In thought, expressions and subject-matter it differs considerably from the other pamphlet; and the mere fact that it came to be distributed about the same time as Ex. A is not a sufficient reason for attributing to the person distributing such a pamphlet any intention other than that which can be gathered from the natural and probable effect of a writing like Ex. C. The intention must be determined in the usual manner with reference to the natural and probable effect of the writing. In my opinion the occasion for

writing it was perfectly legitimate; while extolling the virtues and services of the deceased the writer, no doubt, condemns the opponents of the deceased, particularly those who created according to the writer, serious trouble on the occasion of the funeral. Taking the pamphlet as a whole and also considering the parts objected to, I am not prepared to say that there was any illegal act done in connexion with this pamphlet, because I am not satisfied that it is necessarily defamatory or that it would furnish ground for civil action to any one. Therefore the distribution of such a pamphlet, cannot be treated as an illegal act and I cannot say that the writer intended or had knowledge that a riot was likely to be committed in consequence of Ex. C. I have considered the pamphlet with reference to the charge only. I am not concerned with the propriety or otherwise of the language used and the sentiments expressed, and I express no opinion with reference thereto beyond holding that it does not come within the scope of S. 153.

My learned brother takes a different view of the case with reference to Ex. C. Having regard to the fact that we are agreed as to the conviction under S. 153 in respect of Ex. A, I do not think that this case should be further prolonged by reference to a third Judge. In view of the modification of the sentences, I agree that the order of the Court may be as proposed by my learned brother as regards the convictions and sentences.

Lastly there remains the question relating to the order of security. This order is made under S. 106, Criminal P. C. I am by no means satisfied that the offence under S. 153 is an offence involving a breach of the peace within the meaning of S. 106, Criminal P. C. In the case of *Emperor v. Husain Bakhsh* (4) Dillon, J., has expressed the opinion that a conviction under S. 153 would not bring the case within the purview of S. 106, Criminal P. C. No reasons however are given in support of this view. The expression "offences involving a breach of the peace" has been interpreted in different ways in different cases. Personally I incline to the view that the expression really refers to offences of which a breach of the peace is an essential ingredient. According to

(4) [1907] 29 All. 569=(1907) A. W. N. 171=6 Cr. L. J. 14.

that view the present case would not be within the scope of S. 106, Criminal P. C. But this point has not been fully argued and on the whole I prefer to base my decision on the ground that under the circumstances of the case no order under S. 106 is necessary. It seems to me that the punishment inflicted is quite sufficient under the circumstances of the case. I would therefore set aside the order under S. 106 and direct the bond to be cancelled.

Hayward, J. — The accused, Mulla Rahimatalli, appears to be a member of the Adamji Peerbhoy party, which was excommunicated owing to disputes and litigation about June and July 1917 by the Head Mullaji Saheb from the Dawoodi Bohras, a section of Shia Mahomedans. The accused has been charged with having caused to be circulated an elegy in praise of one of the deceased excommunicant, Sharafalli Mamooji, who died in June 1918 and whose burial was carried out under the protection of a body of Pathans and party of police in the face of the opposition of the orthodox Dawoodi Bohras. The charge was that the elegy was really intended as an insult to the Head Mullaji Saheb who has his residence at Surat, and was circulated with the knowledge that it would inflame the feelings of his followers among the Dawoodi Bohras in Bombay. The accused was also charged with having published about the same time an even more insulting and an obscene pamphlet called Yazidki-id. These pamphlets were distributed about the 10th and 11th July 1918 during the Ramzan-Id amongst the orthodox Dawoodi Bohras in Bombay. These were followed a fortnight later by suits for damages aggregating a crore of rupees, brought by the excommunicants against the Head Mullaji Saheb and they were met on the other side a fortnight later, viz., about the middle of August 1918, by the insulting and obscene pamphlets being placed in the hands of the police by the orthodox Dawoodi Bohras, which led to an investigation being made by Superintendent Pettigara of the Criminal Investigation Department. This ended in the prosecution of Mulla Rahimatalli on 21st September 1918 for having given wanton provocation by the two pamphlets knowing that they would be likely to lead to a riot and with having, in respect of the second pamph-

let, distributed an obscene document. He was convicted after a trial lasting nearly six months on 1st March 1919 and sentenced to fines amounting to Rs. 2,000 under Ss. 153 and 292, I. P. C. He was bound over to keep the peace for one year under S. 106, Criminal P. C.

There seems to me therefore no good ground for differing from the view as to the responsibility of the Mulla for both the pamphlets taken by the learned Second Presidency Magistrate.

It has however been urged on behalf of the accused Mulla in this appeal that the elegy in praise of Sharafalli Mamooji was not really insulting to the Head Mullaji Saheb, nor was it likely to provoke a riot among his followers of the Dawoodi Bohras of Bombay. It has been necessary therefore carefully to consider the whole pamphlet. The first 26 stanzas were restricted to a description of the good qualities of the deceased Sharafalli Mamooji. But the remaining stanzas, Nos. 27 to 61, proceeded to deal with the circumstances of his death and funeral in a manner which could not fail to provoke the resentment among the orthodox Dawoodi Bohras. These stanzas jeered at their failure to prevent the funeral and described with evident delight the successful ruse whereby the body was carried to the burial ground by motor and buried there notwithstanding the protest of the orthodox Dawoodi Bohras under the protection of a hired gang of Pathans and a powerful party of police. These stanzas then proceeded to liken the funeral of Sharafalli Mamooji to that of the Imam Hasan and the endeavours to prevent it to the opposition offered to that of the Imam Hasan by the followers of the hated Omayed Khalif, Yazid. There then followed passages which were intended, in my opinion, to liken the Head Mullaji Saheb to Yazid and his followers to those of that hated Omayad Khalif. They were, at all events, so understood by the Dawoodi Bohras, and there could hardly have been greater or more inflammatory insults thrown at the head and followers of a strict set of Shia Mahomedans.

It is necessary of course, to take into consideration the whole pamphlet and not merely to look to passing references which might give no real indication of its true intention. But, on the other hand it is equally necessary not to be misled by the length of perfectly unexceptional and

proper passages into missing the sting, however short and pungent, lurking in the pamphlet. It seems to me, so read, that the real intention was not the innocent praise of the deceased Sharafalli Mamooji, but that that was merely made a pretext for throwing a deep insult at the head of the Mullaji Sahab, an insult which, the distributor must have known, would be likely to inflame the feelings of his followers and to lead to riot. If the intention had been innocent, the pamphlets would have been circulated merely to the admirers of the deceased Sharafalli Mamooji among the friends of the Mullaji and would not have been distributed just about the time of their Ramzan-Id among the Dawoodi Bohras of Bombay. It has not seriously been contended here that the second pamphlet, entitled Yazidki-Id, was unobjectionable. Great efforts were made to prove this at the trial. Five afternoons of the hearing were occupied over the evidence extending to 25 pages of typed foolscap of the Court Translator. Yet no better translation was produced by any other expert translator. It has been sufficient to pursue the pamphlet to become at once satisfied of its highly provocative nature and of its undoubtedly being a document which, the distributor must have known, would have been likely to lead to riot, particularly when distributed about the time of their Ramzan-Id among the Dawoodi Bohras of Bombay.

It has been suggested that this could not have been so in the case of either of the pamphlets as no immediate riot occurred and as the community has long been known as one of quiet traders. It has however been indicated in the elegy of Sharafalli Mamooji that the seceders hired for their protection a body of Pathans and that the peace was kept at the funeral only by the presence of a party of police, and it has been established by the evidence that great excitement was aroused among these quiet traders by the distribution of the pamphlets, particularly no doubt by that entitled Yazidki-Id. They have no doubt long been known in ordinary life as quiet traders, but they have also been known as fierce sectarians in religious matters and even at the time of the investigation, some weeks later, there was danger of rioting in the opinion of Superintendent Pettigara of the Criminal Investigation Department.

It appears to me therefore that both the pamphlets have rightly been held to have been highly provocative and to have been distributed with the knowledge that they might lead to riot. The Mulla was therefore in my opinion rightly convicted in respect of both the pamphlets under S. 153, I. P. C., by the learned Second Presidency Magistrate.

It has been urged on behalf of the accused Mulla in this appeal that the second pamphlet, entitled Yazidki-Id, was in any case not obscene within the meaning of S. 292, I. P. C. It has not been contended that it did not contain passages which were undoubtedly obscene in the ordinary meaning of the word, that is to say, passages

"expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be expressed or exposed"

as given in Webster's Dictionary. But it has been urged that they were not obscene in the technical sense, as they were not such as would have been likely to corrupt and deprave the minds, that is to say, inflame the sexual rather than the religious passions of the particular persons to whom they were distributed, viz. the orthodox Dawoodi Bohras, and that they therefore were not within the word as understood by the Courts. But corruption and depravity of mind must, in my opinion, necessarily be encouraged by the employment of filthy language tending to debase the high purpose of the sexual relations, even when used primarily to arouse religious passions. It would at the least provoke retort in similar terms and repetition of filthy language would necessarily lower the minds and standards of morality of even orthodox and respectable Dawoodi Bohras. The Mulla was therefore, in my opinion, rightly convicted in respect of the second pamphlet under S. 292, I. P. C. by the learned Second Presidency Magistrate.

It has lastly been urged on behalf of the accused in this appeal that no order could legally be made requiring security to keep the peace under S. 106, Criminal P. C. It has no doubt been held, but without reasons given, in the case of *Emperor v. Hussain Bakhsh* (4) that no such order would be proper on a conviction under S. 153, I. P. C. But the point would appear to me not free from difficulty, as the words used in S. 106 are "offence involving a breach of the peace,"

and no definition has been given of what would amount to a breach of the peace within the meaning of the Criminal Procedure Code. The words would probably be taken in their ordinary meaning to indicate an offence in which there had actually been, and not in which there was mere likelihood of there being, a breach of the peace such as the likelihood of riot in this particular example under S. 153, I. P. C.; but, on the other hand, the term "breach of the peace" has been given a wide interpretation, including even creating disturbance or excitement and falling far short of riot in England, according to the cases cited in Note (q) to para. 610, Vol. 9 of Halsbury's Laws of England. But it would appear to me undesirable to enter into this matter further in default of fuller discussion at the Bar and in default of any particular need for further maintaining the order, which has been already in force for six months, for the remainder of the year.

It would therefore in my opinion, be sufficient, without finally deciding the legal point, to discharge, as no longer necessary, the security taken under S. 106, Criminal P. C. It has not been possible for me to my regret to share the opinion of the first pamphlet taken by my learned brother. It has moreover seemed necessary for me to express my own view emphatically, in order to prevent the misapprehension that a man might be permitted to escape liability for deliberate libel or insult lurking in his publication by a simultaneous parade of a number of perfectly proper platitudes. It has seemed to me important to emphasize in view of the discussion that has taken place at the hearing, that that has never been the law. But it has been fortunately unnecessary further to press this matter, as there has been no difference of opinion whatever as to the second pamphlet between myself and my learned brother. It has therefore practically been reduced to a question of punishment, and it will be sufficient to reduce the fines inflicted for the offence in reference to the two pamphlets to the amount of Rs. 1,000 inflicted in reference to the second pamphlet. The conviction therefore should in my opinion, be confirmed but the sentence reduced to Rs. 1,000 fine in respect of the two pamphlets together under Ss. 153 and 292, I. P. C. There should, in my opi-

nion, be a discharge of the order for security under S. 106, Criminal P. C. The difference of the fines, if paid, should be refunded under the order of the Second Presidency Magistrate.

G.P./R.K.

Sentence reduced.

A. I. R. 1920 Bombay 409

MARTEN, J.

In re Rustomji Framji Bentin and another—Petitioners.

Testamentary and Insolvency Jurisdiction Will No. 116 of 1919, Decided on 19th January 1920.

(a) Succession Act (1865), S. 179—Executor of executor is not legal representative of original testator.

The executors of an executor are not in India the legal representatives ipso facto of the original testator; 12 B.L.R. 423, *Foll.* [P 410 C 2]

(b) Succession Act (1865), S. 69—Whole document must be read.

Wills are particularly documents where it is essential to read whole document otherwise mistakes are sure to occur in ascertaining a testator's intention. [P 410 C 4]

(c) Succession Act (1865), S. 75—Inconsistent clauses—Last prevails.

Where there are two entirely inconsistent clauses in a document and the document is a will and not a deed the last clause must prevail. [P 412 C 1]

(d) Succession Act (1865), S. 71—Two gifts sufficient to include residuary estates—First gift was preferred.

If there are two gifts in the same instrument, each sufficient to include the residuary estate, in cases where lapsed shares of the first gift would leave something for the second gift to operate upon, the first of the two gifts is preferred. [P 412 C 2]

(e) Will — Construction — Wife appointed executrix—Property not disposed by wife inter vivos—Property held should go to children—Children held took vested interest—Letters of administration with will annexed was issued to sons—Succession Act (1865), Ss. 196 and 197.

A Parsi testator died leaving a widow and a large number of children and property worth about Rs. 30,000. The testator, after appointing the wife executrix and "entrusting" substantially all the property to her, proceeded: "and out of the same my wife shall give to all (i. e.) to all my sons and to all (my daughters their shares) in accordance with (the directions) I write below." Then the sons and daughters were named and each of them given a legacy of Rs. 101. Then the testator directed that after the death of his wife, the outlays for funeral and other ceremonies were to be made for the first twelve months out of the bequeathed property, "and after the expiry of those twelve months as to whatever (property) (the wife) may have left (behind her) as residue, out of the same all (my) abovementioned sons and daughters shall divide and receive in equal shares." After this the testator declared that the wife

was to be the owner of the properties and that he "entrusted" the same to her. But then he proceeded to direct her to take the opinions of the sons and daughters and to "act according to (views of) that side where there may be a larger number of votes." Then the testator went on: "When twelve months shall have elapsed after (wife's) death and when all the persons interested may receive their (respective) shares or portions out of the remaining property and moneys which there may be there shall be deducted from their accounts (shares) whatever moneys (wife) may have expended on account of tiraths (occasions) relating to those people and (i. e.) whatever (sums) (she) may have expended as (may appear) from the memorandums of account in their names and the balance which may be found due (to them) shall be paid (to them)." Then there was a provision about the debts of the testator and finally the will stated: "After payments of all the above (mentioned) sums and legacies shall have been made, as to whatever (property) may remain over, all that belongs to my wife and (I hereby) give (the same) to her." The widow obtained a probate of the will and then some years after died herself leaving a will when a petition was made by two sons of the deceased testator whose issue had survived or left children for administration de bonis non with the will annexed of his estate. Their contention was that the widow was not a residuary legatee under their father's will and had no power to make a will herself:

Held: (1) that considering the will as a whole the intention of the testator was that on his wife's death the property or at any rate the property she had not disposed of in her lifetime by any act inter vivos, was to go substantially to his children;

(2) that in the events which had happened in the case, viz. all the children surviving the testator or leaving issue who survived them, they took vested interests and would be the parties to take under testator's will on the death of the widow;

(3) that the last clause in the will was put in to guard against contingencies such as lapsed shares of residue under the preceding gifts and that there was nothing which on the death of the wife could operate under that clause;

(4) that therefore the Letters of Administration de bonis non with the testator's will annexed should issue to the petitioners. [P 412 C 1, 2]

Kanga—for Petitioners.

Judgment.—This is a petition by two sons of the deceased testator for administration de bonis non with the will annexed of his estate. The testator died on 10th August 1899 having left a will, dated 24th March 1887, of which his widow Manekbai was executrix. She subsequently obtained probate and died herself on 16th April 1915, leaving also a will. Since then, viz. on 1st December 1918, a family arrangement between all living parties or their representatives has been arrived at for dealing with both estates. In accordance with that arrangement the present petitioners have

presented the present petition. The parties are all Parsis.

The Testamentary Registrar has some difficulty in the matter because he suggests that the widow Manekbai was the residuary legatee under the testator's will and that consequently under Ss. 196 and 197, Succession Act, her representative would be entitled to the grant of Letters of Administration. He thought therefore that before such a grant could be made the representatives of Manekbai must establish their legal position by taking out probate of the will and incidentally paying duty on the property as forming part of the estate. He therefore, declined to grant administration to the testator's estate until the will of Manekbai was proved.

I am told that the testator's estate has in fact been wholly administered with the exception of a particular landed property at Naegam near Mahim. I may also state that although Manekbai has left executors it would appear that under the practice in India her executors are not considered to be ipso facto the executors of the testator. If this case occurred in England the matter would be quite simple because the executors of an executor are the legal personal representatives ipso facto of the original testator. But it has been decided in *De Souza v. Secy. of State* (1) that that is not the correct view in India and I am informed by the Testamentary Registrar that that case has been followed in this High Court. I do not express any opinion on that authority, but for the purposes of the present case I will assume that it is correct.

In my opinion the main point in the present case is whether the widow Manekbai was the residuary legatee under her husband's will. If one clause of the will, viz. Cl 12, is taken by itself, and the rest of the will is disregarded, no doubt Manekbai would be the residuary legatee. But wills are particularly documents where it is essential to read the whole document. I wish to emphasize this with all the power that I am capable of, because otherwise mistakes are sure to occur in ascertaining a testator's intentions. S 69, Succession Act shows that there is no difference between the correct Indian and English practice in this respect.

(1) [1873] 12 B. L. R. 423.

In the present case it seems to me that if the whole will is read through it is impossible to hold that the widow was residuary legatee in the events which have happened unless one cuts out several earlier clauses in the will. But to do this would in my opinion, entirely defeat the true intention of the testator. Before turning to the will itself I should state that his family, at the date of his will, consisted of six sons and four daughters, but one of those sons, Cowasji, predeceased him leaving children and one daughter died many years after his death leaving children. His will was made over twelve years before his death.

Turning to the will, in Cl. 2 he appoints his wife executrix, and then in Cl. 3 he entrusts what is substantially all his property to his wife. Then he goes on:

"And out of the same my wife Bai Manekbai shall give to all (i. e.) to all my sons and to all my daughters (their shares) in accordance with (the directions) I write below."

I attach importance to this word "entrust." The testator has used it not only in that clause but in subsequent clauses of the will as well.

Then, in Cl. 4, he names his sons and daughters, and in effect gives each of them a legacy of Rs. 101. These trifling sums cannot possibly be the "shares or portions" of the sons and daughters which the testator refers to in several places in the will. According to the 1904 petition he died worth some Rs. 28,783 and the present value of the unadministered property is stated to be Rs. 38,000.

Then in Cl. 5 he directs that after the death of his wife the outlays for funeral and other ceremonies shall be made for the first twelve months out of the above property. Then he goes on:

"And after the expiry of these twelve months as to whatever (property) Bai Manekbai may have left (behind her) as residue out of the same all (my) abovementioned sons and daughters shall divide and receive in equal shares; or if they (can) live together in peace then they shall divide and receive in equal shares out of the abovementioned properties the income (of those properties)."

Stopping there that clause to my mind is entirely inconsistent with the idea that the widow took these properties absolutely.

Then, in Cl. 6 there is a direction for setting aside the sum of Rs. 2,000 for certain ceremonies.

Then in Cl. 7 he gives certain directions

as to what his wife is to do. He says she is to be the owner of those properties and he "entrusts" the same to her. But then he proceeds to direct her to take the opinion of the sons and daughters and the clause winds up:

"she shall act according to (the views of) that side where there may be a larger number of votes."

If she is really an absolute owner, this direction would be void, because an absolute owner cannot be directed to deal with property in accordance with the views of other persons.

Then, in Cl. 8, there is a direction about paying expenses of the house out of the income of the properties.

Clause 9 is important. That provides for certain expenses of the sons and daughters being deducted from their respective shares or portions, and then the testator goes on:

"When twelve months shall have elapsed after Bai Manekbai's death and when all the persons (interested) may receive their (respective) shares or portions out of the remaining property and moneys which there may be, there shall be deducted from their accounts (? shares) whatever (moneys) Bai Manekbai may have expended on account of the tiraths (occasions) relating to those people and (i. e.), whatever (sums) (she) may have expended as (may appear) from memos. of account in their names; and the balance which may be found due (to them) shall be paid (to them)."

How is that provision to be reconciled with an absolute gift to the widow? It is far more consistent with an ordinary gift to a widow for life with remainder to the sons and daughters. It is in effect a provision for bringing advances into hotchpot on the final division of the estate between the sons and daughters.

Then, Cl. 10 emphasizes the authority of the widow, but it would seem to apply mainly to income and I do not think it was intended to obliterate the previous clauses.

Then, Cl. 11 deals with the debts of the testator, and Cl. 12 provides;

"After payment of all the above (mentioned) sums and legacies shall have been made as to whatever (property) there may remain over, all that belongs to my wife Bai Manekbai and (I hereby) give (the same) to her."

It is unnecessary to cite authorities to show that one has, if possible, to make a document consistent as a whole. Ss. 69 and 72, Succession Act, are sufficient to show this. Cl. 12 no doubt causes some difficulty having regard to the previous provisions in favour of the sons and daughters. It may be, as counsel suggests,

that the testator intended the widow to have a life interest with a power of disposition inter vivos, somewhat like the case in *Mafatlal v. Kanialal* (2), which has been cited to me. But in fact she made no disposition inter vivos, and I do not think that the testator intended her to have any power of disposition by will. I need not, therefore consider whether such latter power would be a general power, or a special power of appointment amongst her sons and daughters, in which latter event the property in question would not form part of her estate.

The view I prefer is that Cl. 12 was put in to guard against contingencies such as lapsed shares of residue under the preceding gifts. The gift to the widow in Cl. 12 only operates on "whatever may remain over" "after payment of all the abovementioned sums and legacies shall have been made." These "sums and legacies" include, I think, the shares and portions given to the sons and daughters in Cls. 5 and 9 which, in my opinion, are residuary gifts. But a son or daughter might have predeceased the testator and left no children. In that case, there would, I think, have been an intestacy but for Cl. 12. I say this, because the gift is to the sons and daughters nominally as tenants-in-common and not as a class. The gift in Cl. 5 is "to the abovementioned sons and daughters" and this obviously refers to those named in Cl. 4. Further, the gifts in Cls. 5 and 9 are clearly to them as tenants-in-common. If then a son or daughter predeceased the testator and left no descendants to take under S. 96, his or her share would have gone as on an intestacy under S. 95, Succession Act, but for Cl. 12 of the will.

I do not think one can say in this case that there are two entirely inconsistent clauses, and that the document being a will, and not a deed, the last clause must prevail: see S. 75. I think that what the testator intended here was that on his wife's death the property, or at any rate the property which she had not disposed of in her lifetime by any act inter vivos was to go substantially to his children, and that no other reasonable meaning can be given to the clauses which I have dwelt upon and in particular Cls. 3, 5, 7 and 9. It may be that when one talks about a residuary legatee, that is

sometimes rather an ambiguous expression. You may have a residue of a residue. You may have what is sometimes called a true residue: cf. *In re Stoodley, Hooson v. Stoodley* (3). But in the events which have happened in this case, viz. all the sons and daughters surviving the testator or leaving issue who survived him, I think there is no doubt that they took vested interests and that they would be the parties to take under the testator's will on the death of the widow, and that there was really nothing on her death which could operate under Cl. 12 of the will.

Paragraph 1292, Vol. 28 of Halsbury's Laws of England at pp. 677-8 illustrates the extreme reluctance of the Court to hold that S. 75 applies and also the various constructions that have been adopted to avoid that result. One sentence seems particularly in point here, viz.:

"If there are two gifts in the same instrument each sufficient to include the residuary estate, in cases where lapsed shares of the first gift would leave something for the second gift to operate upon, the first of the two gifts is preferred."

For this proposition, *In re Isaac, Harrison v. Isaac* (4) and other cases are cited. Here, even if one gives the largest possible meaning to Cl. 12 and eliminates the reference to the prior payments, one must still admit that Cls. 5 and 9 are also sufficient to include the residuary estate.

In my opinion therefore the conclusion which was arrived at by the Testamentary Registrar was not the correct view to take of this will. Although I am sitting as a Testamentary Judge I have found it necessary for the purpose of deciding this application to ascertain the true construction of this will. It would seem unlikely, having regard to the deed of family arrangement that any contest on the construction of the will is in fact likely to arise on the original side. But in the will of Manekbai, a copy of which I have called for and seen, there is in Cl. 17 a provision in favour apparently of the heirs of Manekbai's sons. I say nothing as to whether this provision is good or not. But if it is good, it may be that heirs of Manekbai's sons, who, for all I know may now be unborn,

(3) [1915] 2 Ch. 295=84 L. J. Ch. 822=59 S. J. 681; Reversing on appeal (1916) 1 Ch. 242=85 L. J. Ch. 226=114 L. T. 445=66 S. J. 221.

(4) [1905] 1 Ch. 427=74 L. J. Ch. 277=92 L. T. 227.

would have an interest in contending that the property passed absolutely to Manekbai under the testator's will, and that consequently she could dispose of it by her will. Technically, I may not have those heirs represented before me now. How far, if at all. My decision as Testamentary Judge for the purposes of the present application is binding on these heirs on the point of construction may be left to be decided by others if and when the question ever arises.

In the result, therefore I direct that Letters of Administration de bonis non with the testator's will annexed do issue to the petitioners as prayed subject to the Testamentary Registrar's usual requirements being satisfied. The order may be prefaced by the words

"the Court being of opinion that on the true construction of the will of the testator and in the events which have happened, the testator's widow Manekbai was not the testator's residuary legatee under his will within the meaning of Ss. 196 and 197, Succession Act."

I am not asked to make order as to costs.

G.P./R.K.

Order accordingly.

A. I. R. 1920 Bombay 413

SHAH AND HAYWARD, JJ.

Sakharam Manchand Gujar—Plaintiff—Appellant.

v.

Keval Padamsi Gujar—Defendant—Respondent.

Second Appeal No. 441 of 1918, Decided on 21st October 1919, from decision of First Class Sub-Judge, Satara, in Appeal No. 426 of 1916.

Limitation Act (9 of 1908), S. 20—Part payment of principal—Writing in hands of person making payment extends limitation.

If the fact that a payment is made by a debtor to a creditor appears in the handwriting of the person making the payment, and if it appears on the evidence in the case that the payment was in part satisfaction of the principal of a debt, the requirements of S. 20, Lim. Act, would be satisfied. [P 414 O 2]

Patvardhan and M. V. Bhat—for Appellant.

G. S. Rao—for Respondent.

Shah, J.—The plaintiff in this case sued to recover the price of certain goods sold to the defendant on 10th September 1912 with interest up to date of suit; and deducting therefrom the amount received he claimed in all Rs. 1,197 at the date of the suit. The suit was filed on 14th October 1915. It was filed more than three years after the date on which the

goods in question were supplied. But the plaintiff relied upon part-payments in respect of the debt made in two sums in July 1913, one of Rs. 198.8.0 forming part of the cash payment of Rs. 500 and the other of Rs. 235 by a hundi received from the defendant, and upon the fact of the payments appearing in a letter written by the debtor on 2nd July 1913.

In the trial Court the defendant denied the claim on the merits and pleaded limitation. It was however found that the goods in question were sold by the plaintiff to the defendants and that the price of the goods was Rs. 1,350 with certain incidental charges in respect of the transaction. The trial Court however found that the part payments in question did not satisfy the requirements of S. 20, Lim. Act, and that the claim was time barred. Accordingly the plaintiff's suit was dismissed. The plaintiff appealed to the District Court, and the First Class Subordinate Judge with appellate powers upheld the plea of limitation and dismissed the appeal.

In the appeal to this Court by the plaintiff the same question of limitation has been raised. It is urged on behalf of the appellant that the requirements of S. 20, Lim. Act, are satisfied in this case, that the two payments appear in the handwriting of the defendant and that they were made in respect of an account under circumstances under which the inference must necessarily arise that they were made in part payment of the debt in question. On the other hand on behalf of the respondent it is urged that the requirements of S. 20, Lim. Act, have not been satisfied, as the writing in question does not show in terms that the payments were in respect of the debt in question, and that the payments were intended to be only part-payments, even if they were otherwise referable to the debt in question. It is contended that the debtor may have intended to make the payments in full satisfaction of the claim, that at least there is an ambiguity on the point and that an ambiguous writing of that character cannot serve the purpose of the plaintiff.

It is necessary at the outset to state that the account between the plaintiff and the defendant at the date of these two payments showed only a balance of about Rs. 301 apart from the debt in suit. There is no dispute in the present

case about the correctness of this account. Over and above this balance at the date there was the debt of about Rs. 1,350 relating to the transaction in question. Thus the total amount due at the date of the two payments was a little over Rs. 1,650. When on 4th and 5th July 1913 the debtor paid two sums of Rs. 500 and Rs. 235, he necessarily paid a part of the debt in question. There is no other account between the parties and there is no other debt due by the defendant to the plaintiff than that appearing in the account. When he made these two payments, the defendant wrote a letter to the plaintiff as follows:

"The reason for writing the letter is that your letter is received. I have sent currency notes of Rs. 500 and a hundi for Rs. 235, in all Rs. 735. Credit them."

It is true that this letter does not in terms contain any reference to the debt in question, nor does it state in terms that the sums were to be treated as part payments of the debt in question. But the letter itself refers to a letter received by the defendant from the plaintiff. The letter which would be in the possession of the defendant has not been produced, and there is no evidence of the contents of that letter. The account shows that the debt in question was ascertained some time before the payments. The state of the accounts and the terms of the letter clearly show that the defendant was either aware or made aware at the time of these payments of the existing state of the accounts which would include the debt in question, and further that he made the payments not intending that they were to be treated as payments in full satisfaction of the amount then due, but in the ordinary course intending thereby satisfaction of the amount due on the account to the extent of the payment.

The question is whether, on these facts, the payments made satisfy the requirements of S. 20, Lim. Act. That section provides that where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor, a fresh period of limitation shall be computed from the time when the payment was made, subject to the proviso that in the case of part payment of the principal of the debt the fact of the payment appears in the handwriting of the person making the same. In the present case

there can be no doubt about the fact of a part of the debt having been paid by the debtor on the state of the accounts. There is no doubt also that the fact of the payment appears in the handwriting of the person making the same. It is urged however that the proviso is not satisfied, as the fact that the payment was made in part satisfaction of the debt in question does not appear in the handwriting of the person making it. I do not think that the proviso requires that to be done in terms. It seems to me on the words of the proviso that if the fact of the payment appears in the handwriting of the person making the same, and if it appears on the evidence in the case that the payment was in part satisfaction of the principal of a debt, the requirements of the section would be satisfied. The argument urged on behalf of the respondent requires the reading of words in the proviso, which are not there.

The words in the proviso refer to the fact of payment and not to the fact of the payment being a part payment of the principal. It is not without significance that the words "as such" used with reference to the payment of interest are not used with reference to the part payment of the principal. The view I take is consistent with the decision in *Jada Ankamma v. Rama Sastrulu* (1) and the observations in *Kedar Nath Mitter v. Dinabandhu Shaha* (2). In the present case the lower appellate Court seems to me to have proceeded upon an erroneous view as to the meaning of the proviso. The decision in *Ranchordas v. Pestonji* (3) relied upon by the lower appellate Court does not seem to me to conflict with the view which I take of the proviso, on the contrary some of the observations in the judgment seem to support that view. All that is necessary, in my opinion, for the creditor to prove in such a case is that the fact of the payment appears in the handwriting of the person making the same and further that the payment is really in part satisfaction of the principal of a debt. If these two facts are established, the creditor is entitled to have the benefit of the saving provisions of S. 20 on the question of limitation. In the present case both the

(1) [1883] 6 Mad. 281.

(2) [1915] 42 Cal. 1043=31 I. C. 626.

(3) [1907] 9 Bom. L. R. 1329.

facts are proved. The payments appear in the letter, written by the debtor; and the same letter taken along with the undisputed facts as to the state of the accounts between the parties, clearly shows that the payments were in part satisfaction of the debt in question.

I would therefore allow this appeal, set aside the decree of the lower appellate Court, and allow the plaintiff's claim for Rs. 1,197 with interest at 6 per cent from the date of the suit to the date of payment with costs throughout on the defendant.

Hayward, J.—I agree. The account in the books of the plaintiff showed that there was a sum of about Rs. 300 due besides the debt of Rs. 1,350 sought in this litigation to be recovered from the defendant. The defendant made two payments, one of Rs. 500 and the other of Rs. 235 in response to a letter received by him, but which he has not produced. The first payment was sufficient to wipe off the Rs. 300 odd due and to leave besides a balance of some Rs. 200, which together with the other payment of Rs. 235 would be available against the debt of Rs. 1,350 odd demanded in this litigation from the defendant. It seems to me that the inference naturally to be drawn from these facts would be that this balance of Rs. 435 was intended as a part payment of the principal sum of Rs. 1,350 odd, which must have been included in the demand which was no doubt made in the letter which has not been produced by the defendant. This inference would seem to me to be justified on the principles laid down in the cases of *Evans v. Davis* (4) and *Friend v. Young* (5). It was however held at the trial that that would not be enough and that it would be necessary to show not only that such part payment was noted in the handwriting of the defendant, but also that the principal sum towards which it was paid should also be noted in the handwriting of the defendant under the proviso to S. 20, Limitation Act. It seems to me however that that was an error. It was not required by the express words of the proviso that anything but the payment should be noted in the handwriting of the person making it. It

(4) [1896] 4 Ad. & E. 840=2 H. & W. 15=6 L. J. K. B. 268=111 E. R. 1000.

(5) [1897] 2 Ch. D. 421=78 L. T. 222=46 W. R. 193.

was not expressly provided that the principal debt to which the payment was made should also be noted in the handwriting of the person making it and that was pointed out by Sir Lawrence Jenkins in the case of *Kedar Nath Mitter v. Dinabandhu Shaha* (2). There a cheque drawn in favour of the payee was the document which noted the part payment and there would not be in such a document any mention of a principal debt towards which the payment was made. It would appear to me therefore that it was sufficient to prove that the payment was noted in the handwriting of the defendant and it was not necessary to prove besides anything more than that the payment was intended to be a part payment of the principal sum demanded from the defendant. It was not necessary, that is to say, to have a description of the principal debt also noted in the handwriting of the defendant. The demand therefore for the balance due upon this debt of Rs. 1,350 odd was, in my opinion saved from the bar of limitation by the provisions of S. 20, Limitation Act.

There ought therefore in my opinion to be a decree in favour of the payee as proposed for Rs. 1,197 principal with interest at 6 per cent. from the date of suit till payment with costs from the defendant in all Courts.

G.P./R.K.

Appeal allowed.

A. I. R. 1920 Bombay 415

MACLEOD, C. J. AND HEATON, J.

In re Sikandar Khan Mahomedkhan—Appellant.

Criminal Appeal No. 709 of 1919, Decided on 15th January 1920, from order of Addl. Sess. Judge, Ahmedabad, in Miso. Appln. No. 16 of 1919.

Criminal P. C. (5 of 1898), S. 195—Sanction to prosecute refused by First Class Magistrate—Additional Sessions Judge can grant same.

An Additional Sessions Judge has jurisdiction to hear an application or an appeal from a First Class Magistrate refusing to give sanction to prosecute under S. 195 and has jurisdiction to grant a sanction refused by such Magistrate.

[P 416 C 2]

G. N. Thakor—for Accused.

D. G. Dalvi—for Complainant.

Macleod, C. J.—The petitioner has appealed from an order of the Additional Sessions Judge, reversing an order of the First Class Magistrate, who refused to give sanction to prosecute the petitioner. A Rule was granted on the petitioner's ap-

plication of 16th October 1919, and therefore it seems it was treated by the learned Judges who granted the Rule as an application in revision. The petitioner charged the accused with causing hurt with a dangerous weapon. The accused was acquitted and the trying Judge expressed the opinion that if the police applied for sanction to prosecute the petitioner he would have granted it. The police did not apply. The First Class Magistrate appears to have thought that he was prevented from giving sanction, because he had previously said that he would only give sanction if an application was made by the police. The fact remains that it is evident from his judgment in the assault case that he thought that it was a case in which sanction ought to be given.

The Additional Sessions Judge has granted sanction to prosecute the petitioner. It has been argued before us that he had no jurisdiction to make the order. S. 195, Criminal P. C., deals with sanctions for prosecution for certain offences and under sub-S. (6) any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate; and under sub-S. (7) for the purposes of the section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. Clearly the First Class Magistrate was subordinate to the Sessions Court. An appeal would lie ordinarily to the Sessions Court. S. 409 especially provides that an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge. Therefore it is difficult to see how it can be said that an appeal would not ordinarily lie and could not be heard by the Additional Sessions Judge. Under S. 193 (2), Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try. It has not been contended that there has been no general order by the Local Government empowering the Additional Sessions Judge in this case to try ordinary cases and appeals, such as are intended by S. 409. Otherwise the Additional Sessions Judge would have no power to try any case at all. Once we come to the conclusion that the

Additional Sessions Judge would ordinarily have jurisdiction to hear appeals from the First Class Magistrate then it seems to follow from S. 195 that the Additional Sessions Judge would have jurisdiction to hear an application or an appeal from the First Class Magistrate refusing to give sanction. Therefore in my opinion, the Additional Sessions Judge had jurisdiction to give sanction, reversing the order of the First Class Magistrate, and I see no reason to interfere with the conclusion he came to. The Rule is discharged.

Heaton, J.—I concur in the order proposed, and I will add a few words on the question of jurisdiction. As I understand the Code, when an Additional Sessions Judge is appointed under S. 9 of the Code he is appointed to exercise the jurisdiction of the Court of Session. So far as S. 9 taken by itself makes it clear, or enables us to understand matters, an Additional Sessions Judge and even an Assistant Sessions Judge has all the powers of a Sessions Judge, and if we confine our attention to S. 9, he is a Sessions Judge. But thereafter the Code proceeds to limit in certain particulars the powers both of the Additional and of Assistant Session Judges. It does so, for instance, in S. 31 in the matter of the sentences which an Assistant Sessions Judge can impose. It does so in S. 193 in the matter of the trial of cases. It does so in S. 409 in the matter of power to hear appeals. An Additional Sessions Judge has power to hear appeals, an Assistant Sessions Judge has not. But the theory of the Code to my thinking is quite clear. The Additional Sessions Judge has those powers of the Court of Session which he is not by some specific provision of the Code prohibited from exercising. He is certainly not prohibited from exercising the power to hear an appeal or an application, whichever you call it, against an order of sanction or refusal to grant sanction made by a lower Court. It seems to me therefore that it is not made out that the Additional Sessions Judge acted without jurisdiction. There is no other reason of importance why his order should be interfered with.

G.P./R.K.

Rule made absolute.

A. I. R. 1920 Bombay 417

MACLEOD, C. J. AND SHAH, J.

Damodar Raghunath Karandikar and another—Defendants—Appellants.

v.

Vasudeo Parsashram Ketkar and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 18 of 1918, Decided on 15th September 1919, against decision of Asst. Judge, Ratnagiri.

Khoti Settlement Act (1 of 1880), Ss. 9 and 10—Transfer of occupancy right in contravention of Act—Khot cannot recover possession.

A transfer of occupancy rights in contravention of the provisions of the Act though void against the khot does not annihilate the occupancy tenants' rights or entitle the khot to recover possession of the lands: 30 Bom. 290, *Foll.*

[P 417 C 2]

G. S. Rao and A. G. Desai—for Appellants.

S. R. Bakhale—for Respondents.

Judgment.—In this case the plaintiff sued for a declaration that the occupancy right respecting the plaint property was extinguished or forfeited, and that the property had become the absolute property of the khots and for possession and future mesne profits. The facts shortly are that defendants 2 to 6 were the occupancy tenants of the plaintiff khot. On the 12th January 1912 defendant 2 for himself and defendants 3 and 4 purported to sell their occupancy rights to defendant 1 and giving him possession. It is claimed by the plaintiff that the defendants thereby forfeited their occupancy rights, and that therefore he was entitled to possession of the plaint property. The trial Court dismissed the suit with costs. The lower appellate Court declared that the occupancy tenancy in the plaint as amended was determined and the appellants were entitled to recover possession. In our opinion the order of the lower appellate Court was wrong. The case is covered by authority. In *Yesa v. Sakharam Gopal Ganu* (1) the head-note runs:

There is no authority for saying that an occupancy tenant whose tenancy is not determined forfeits his tenancy by parting temporarily with the possession of his land to another without resigning the land as completely as would be necessary in the case of privileged occupants of another sub-class to place the land at the disposal of the khot. And so long as his

tenancy is not determined the land is not at the disposal of the khot. And the khot cannot claim to treat the person in possession under a right derived from the occupancy tenant, either as a trespasser or even as yearly tenant so long as the privileged occupant's rights remain undetermined by resignation, or lapse of duly certified forfeiture."

It is admitted that this case arose before the Khoti Settlement Act of 1880 was amended. S. 10 of that Act provides for the resignation, lapse or forfeiture of privileged occupants' lands, although the occupancy tenants' rights under S. 9 are said to be heritable, but not otherwise transferable. There was no provision in the Act before it was amended whereby the transfer by an occupancy tenant of all his rights to the third parties brought about the termination of his rights. That was provided for in the amended Act. Under S. 2 of the Amending Act 8 of 1912, Ss. 9 and 10 of the Act of 1880 were repealed and new sections were enacted. Under new S. 10:

"If any occupancy tenant does any act purporting to transfer such land or any portion thereof or any interest therein without the consent of the khot, such land shall be at the disposal of the khot as khoti land free of all encumbrances."

It is quite clear therefore that under the Act of 1880 as stated by Batty, J., in his judgment in *Yesa v. Sakharam Gopal Ganu* (1):

"The Act attaches no consequence to a prohibited transfer, but merely renders it abortive, null and void: It does not annihilate the occupancy tenants' rights. And unless they are otherwise determined the land is not at the disposal of the khot and he has no rights under Ss. 7, 9 and 10 to maintain any objection except this, that the transferee cannot claim for himself any permanent tenure on the fixed statutory rent."

The result must be that, although defendants 2 to 4 transferred their occupancy rights in 1912 to the defendant 1, and that transfer is null and void as against the khot, defendants 2 to 4 still remain his occupancy tenants. We are not concerned with what may have happened since the transfer as all the rights of the khot against his occupancy tenants are preserved in spite of the transfer. In our opinion the decision of the lower appellate Court was wrong and the suit must be dismissed with costs throughout.

G.P./R.K.

Decree reversed.

(1) [1906] 30 Bom. 290—7 Bom. L.R. 911.

A. I. R. 1920 Bombay 418

SHAH AND HAYWARD, JJ.

Raoji Bhikaji Kondkar—Defendant 1
—Applicant.

v.

Laxmibai Anant Kondkar—Plaintiff—
Opponent.

Civil Appln. No. 352 of 1918, Decided on 15th July 1919, against decision of Batchelor, Ag. C. J., and Shah, J. D/- 30th January 1918, in Appeal No. 130 of 1916.

(a) Civil P. C. (5 of 1908), S. 110—Value of claim at date of decree is to be considered.

In order to satisfy the requirements of S. 110, the value of the claim, that must be taken into account in determining whether an appeal lies to His Majesty in Council, is the value on the date of the decree from which the applicant seeks to appeal. [P 419 C 1]

(b) Civil P. C. (1908), S. 110—Claim for share of family property—Value for purposes of appeal is value of the share and not of whole property.

Where the subject-matter of a suit is a share in family property, in determining the value of such subject-matter for the purpose of an appeal to His Majesty in Council, the value of the share only ought to be regarded, and not the value of the whole property. [P 419 C 2]

A. G. Desai—for Applicant.

P. B. Shingne—for Opponent.

Shah, J.—This is an application for leave to appeal to His Majesty in Council from the decree of this Court in First Appeal No. 130 of 1916, on the ground that the requirements of S. 110, Civil P. C., are satisfied.

In the suit as originally brought the plaintiff claimed one-half share in the family property and valued it at Rupees 12,000. Defendant 1, his uncle, and defendant 2 his grandmother, pleaded that he was entitled only to one-third share. A decree was passed in his favour to the extent of one-third share in the property. After the preliminary decree was passed, defendant 2 died and the plaintiff then made an application to have the decree amended by claiming a moiety in the one-third share of his grandmother. The trial Court held that on her death that share became equally divisible between the plaintiff and defendant 1. Defendant 1 preferred an appeal to this Court, which related to the one-sixth share which the plaintiff claimed after the death of defendant 2 over and above the one-third share already awarded to him. This Court confirmed the decree of the trial Court, holding that the plaintiff was entitled to divide equally with defendant 1 the

share which defendant 2 could have claimed in her lifetime.

As the decree of the lower Court is confirmed by this Court, under S. 110 it is essential that the appeal must involve some substantial question of law. This condition in my opinion, is satisfied in the present case. The appeal raises the question as to whether on the death of Yeshodabai the plaintiff became entitled to a moiety of her share in the property or whether defendant 1 was exclusively entitled to that share.

As to the value of the subject-matter of the suit, in the Court of first instance it is clearly over Rs. 10,000. But the subject-matter in dispute on appeal to His Majesty in Council would be the one-sixth share of the whole estate. If the value of this one-sixth share is Rupees 10,000, or upwards, the applicant would be entitled to the certificate. But if the value of that share is less than Rs. 10,000 he cannot succeed.

It is urged on behalf of the applicant that even if the value of the one-sixth share be less than Rs. 10,000 under para 2, S. 110, the decree sought to be appealed from in this case involves, directly or indirectly, a claim to or question respecting, property of the value exceeding Rs. 10,000. It is contended that under this paragraph of the section the property referred to must be taken to be the whole property of the family sought to be partitioned and not only the one-sixth share. I am of opinion that this contention is not sound. In this case the decree from which the applicant seeks to appeal to His Majesty in Council involves, directly or indirectly, a claim to or question respecting one-sixth share of the property only. It is not suggested that by that decree any property outside the one-sixth share to which the appeal to this Court related would be affected. A similar contention as to the true meaning of para. 2, S. 110, Civil P. C., in relation to a partition suit was considered and negatived by Jenkins, C. J., and Russel, J., in *De Silva v. De Silva* (1).

The applicant therefore can succeed only if he is able to satisfy this Court that the one sixth share of the family property including the mesne profits is worth Rs. 10,000 or upwards. The value of the share, according to the value of

the family property estimated by the plaintiff in the plaint, would be only Rs. 4,000 exclusive of the mesne profits. But the applicant asserts through his son, who has made an affidavit, that the whole property during the year 1918-1919 has considerably increased in value and is worth nearly Rs. 66,000, and that on that calculation the value of one-sixth would exceed Rs. 10,000. The opponent has filed a counter-affidavit made by her father Bapuji Atmaram Tendulkar, in which the correctness of the allegation made on behalf of the applicant is questioned. Thus there is a dispute between the parties as to the value of this property. Where such wide fluctuations in the value of the property are asserted, it is essential to fix the date, with reference to which the value of the property should be estimated for the purpose of this application. Having regard to the terms of S. 110 it seems to me that the value of the one-sixth share on the date of the decree from which the applicant seeks to appeal to His Majesty in Council must be determined and must be taken into account in determining whether the requirements of S. 110 are satisfied. This view is supported by the decision in *Surendra Nath Roy v. Dwarka Nath Chakrabutty* (2).

It is necessary therefore to know the market-value of the one-sixth share of the property in suit at the date of the decree of this Court, i. e., on or about 30th January 1918. As the parties are not agreed as to the value of the property under R. 5, O. 45 we refer the dispute as to the value of the one-sixth share in the whole property, which is the subject-matter in dispute on appeal to His Majesty in Council, for report to the trial Court.

The lower Court will also report as to the value of the one-sixth share of the mesne profits from the date of the suit to the date of the High Court decree. Apparently the mesne profits have not been ascertained yet. For the purpose of this application it is necessary that they should be estimated, as the one-sixth share in the mesne profits forms part of the subject-matter of the appeal to His Majesty in Council.

The report to be made to this Court in one month.

(2) [1917] 44 Cal. 119=35 I. C. 608.

Hayward, J.—I agree. The plaintiff's one-half-share was the subject-matter of the suit and was valued at Rs. 12,000 in the Court of first instance. Defendant 1's claim in appeal is for one half of the one-third share of defendant 2, which would be at the previous rates only Rs. 2,000. But it has been contended that the value of the property has risen and that the value of the claim in appeal would now be Rs. 11,000 being one-sixth of the total value now estimated to be Rs. 66,000 and affidavits have been put in by the parties on either side affirming and contesting this position. There must therefore in my opinion be an inquiry as to the real value under R. 5, O. 45 of the schedule to the Civil Procedure Code.

It has been urged that in any case the value of the share only ought not to be regarded, but the value of the whole property. But it seems to me that we ought in this matter to follow the decision of *De Silva v. De Silva* (1) and not the contrary decision of *Lala Bhagwat Sahai v. Rai Pashupati Nath* (3) of the Calcutta High Court. On the other hand the value of the subject-matter of the appeal ought, in my opinion, to be the value at the date of the decree of the High Court, as held in the case of *Surendra Nath Roy v. Dwarka Nath Chakrabutty* (2).

There is, in my opinion, a substantial question of law involved, viz., the exact effect of the proceedings in the litigation as regards the share of the deceased defendant 2 and the legal effect of that position under the rules of Hindu law.

G.P./R.K.

Issues remitted.

(3) [1906] 10 C. W. N. 564=3 C. L. J. 257.

A. I. R. 1920 Bombay 419

PRATT, J.

Muradally Shamji—Plaintiff.

v.

B. N. Lang—Defendant.

Original Civil Suit No. 339 of 1918,
Decided on 7th July 1919.

(a) Presidency Towns Insolvency Act (3 of 1909), S. 38 (b) — Discharge ordered but suspended for one year—Order operates from date therein; final order is not necessary—Suit for injunction against public officer—Notice is not necessary under Civil P. C. (1908), S. 80.

A was adjudicated an insolvent and an order was made vesting his estate in the Official Assignee. Thereafter he applied for his discharge and an order was made accordingly, but under

S. 38 (b) the operation of the order was suspended for one year. Three years after the date of this order A acquired a business and the Official Assignee, in view of the fact that no final order of discharge had been made, took possession of A's stock-in-trade and then restored possession and allowed him to continue his business on condition of his making payments for the benefit of his scheduled creditors. The Official Assignee then threatened to take possession and A filed the present suit to recover the sums which he had paid, for damages for trespass and for an injunction for the threatened trespass. Upon a preliminary objection being taken that as A had not given notice as required by S. 80, Civil P. C. the suit was not maintainable, he dropped his claim for damages and for the money paid:

Held: (1) that the suit in respect of the injunction for the threatened trespass was maintainable, even although the required notice under S. 80, Civil P. C., had not been given.

[P 420 C 2 ; P 421 C 2]

(2) that the order of discharge operated from the date mentioned therein, and that A was entitled to the injunction for which he prayed.

[P 422 C 2]

The practice of the Bombay High Court requiring an insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension is contrary to law. [P 422 C 2]

(b) Practice—High Court—If contrary to law, cannot be upheld.

Practice is a useful guide where a statute uses a language of doubtful import, but a practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful.

[P 422 C 2]

Ghaswalla and Kanga—for Plaintiff.

Desai and R. D. N. Wadia—for Defendant.

Judgment.—On 26th September 1911 the plaintiff in this suit was adjudicated insolvent and an order was made vesting his estate in the Official Assignee. The plaintiff thereafter applied for his discharge and on 2nd October 1912 an order was made in the following terms:

"It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from 2nd October 1913."

In 1916 and 1917 the plaintiff acquired a saddlery business. On 22nd January 1918 the Official Assignee, considering that no final order of discharge had been made, took possession of the plaintiff's stock-in-trade and then restored possession and allowed the plaintiff to continue his business on condition of his making payments for the benefit of his scheduled creditors. On 7th March 1918 the Official Assignee threatened to re-take possession, and on 8th March the plaintiff filed this suit to recover the sums which he had paid to the Official Assignee, as he

says, under coercion, for damages for the alleged trespass and for an injunction to restrain the threatened trespass.

A preliminary objection has been taken that the suit is not maintainable as the plaintiff has not given notice as required by S. 80, Civil P. C.

There is no question but that the Official Assignee is a "public officer" entitled to such a notice: *Joosub Haji v. N. W. Kemp* (1). It is sought however to take this out of the operation of the section as one of the reliefs claimed is for an injunction to restrain a future act of trespass.

Section 80 is as follows:

"No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing, etc."

It is said that the words "act purporting to be done by such public officer in his official capacity" refer to past and not to future acts. If the matter were *res integra*, I should have found no difficulty in deciding that they do refer to future acts. If the words were limited to past acts, it would have been easy to express that limitation by such words as "purporting to have been done", as for instance in S. 167, Bombay District Municipalities Act, 1901. I think it quite clear that the clause "purporting to be done by such public officer in his official capacity" is merely an adjectival clause qualifying the substantive word "act." The section refers to official acts without any reference to the time when the act was or is or is expected to be performed. The act may be past, present or future, but the only qualification imposed by the section is that it is one committed or likely to be committed in the execution or intended execution of some public duty.

In *Flower v. Local Board of Low Leyton* (2) a similar provision in the Public Health Act (38 & 39 Vic., c. 55) was held to be inapplicable to suits for an injunction. The judgment proceeded on the ground that a Court of Chancery would not have held that its jurisdiction to grant equitable relief was limited by the section; for otherwise irreparable injury might be done before the Court could

(1) [1902] 26 Bom. 809=4 Bom. L. R. 929.

(2) [1877] 5 Ch. D. 47=46 L. J. Ch. 621=36 F. T. 700=25 W. R. 545.

intervene. The fallacy of this argument has been exposed in *Colls v. Home and Colonial Stores, Ltd.* (3). The Court of Chancery in its concurrent jurisdiction enforced legal rights by equitable remedies. But by inadvertence equitable doctrines were sometimes applied to the right instead of to the remedy. This process was stopped by the House of Lords in *Colls v. Home and Colonial Stores, Ltd.* (3). The Chancery Court had granted an injunction to restrain a building which would deprive plaintiff of some of the light he had been enjoying, but yet would not interfere with his Common law right to such light as was necessary to make his house habitable. The Court of Chancery had thus inadvertently enlarged the plaintiff's Common law right. The House of Lords overruled a multitude of decisions of Chancery Judges and held that the equitable remedy must be limited to legal right. Lord Macnaghten said:

"Courts of equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief, or where an injunction was required to prevent multiplicity of actions."

Now, in *Flower v. Local Board of Low Leyton* (2) an injunction was granted where plaintiff had under the statute no right of action, and thus the equitable jurisdiction of the remedy was inadvertently used to enlarge the legal right on which the remedy was claimed. This is the very abuse condemned in the judgment of the House of Lords.

Flower v. Local Board of Low Leyton (2) is therefore no longer good law; and it is perhaps unnecessary to add that the Courts in India cannot invoke the equitable jurisdiction of the Court of Chancery to override the law as enacted in the Acts of the Indian legislature.

However, *Flower's* case (2) was followed by this Court in *Secy. of State v. Gajanan Krishna Mavlankar* (4) and *Naginlal v. Official Assignee* (5). In the former case it was stated that if the future act was so imminent that it was practically impossible for the plaintiff to give notice and serious injury was threatened, the Court would not be debarred from entertaining the suit.

This was an obiter dictum, as the suit was held to be barred. But it was followed in the second case, where the suit was filed to restrain a threatened sale by the Official Assignee and was held maintainable in spite of the fact that no notice had been given. Though I respectfully differ from this case, I am bound by it.

In this suit there are two distinct causes of action; a tort already committed and a threatened trespass on the plaintiff's property. Damages are claimed for the first, and an injunction to restrain the second. The suit under the first cause of action is not maintainable. But the injunction is a substantive relief claimed under the second cause of action. The threat of trespass was made on the 7th of March. Danger was indeed so imminent that the suit was filed on 8th March and the trespass was restrained by an interim injunction granted on the same day. Mr. Ghaswalla drops his claim on the first cause of action and elects to proceed only on the injunction in respect of the second cause of action, and under *Naginlal's* case (5) I think he is entitled to do so.

The finding on issue 2 will be: Plaintiff having dropped the claim for damages and for recovering the money payable under coercion, suit is maintainable in respect of the injunction to restrain the threatened trespass.

After further arguments the Court delivered on the 25th July 1909 the following

Final Judgment.—In view of the judgment on issue 2 the only issue that survives is the first as to whether the plaintiff is entitled to an injunction.

There is a suggestion in para. 2 of the written statement that the property which the Official Assignee claims is not the property of the insolvent acquired after his discharge. If this were so, it might be contended that this property was vested in the Official Assignee and that the effect of the order of discharge was not to re-vest this property in the insolvent: *Thomas Pereira*. In the matter of (6). The point was raised at the time the order was made suspending the insolvent's discharge, but it was not clear whether the question was then decided. However Mr. Wadia does not make this defence and rests his case solely on the

(6) [1862-63] 1 M. H. O. R. 217.

(3) [1904] A. C. 179=79 L. J. Ch. 484=53 W. R. 30=90 L. T. 637=20 T. L. R. 475.

(4) [1911] 85 Bom. 362=10 I. O. 639.

(5) [1913] 87 Bom. 248=17 I. O. 876.

ground that the order of 2nd October 1912 did not operate as a discharge from 2nd October 1913, and that therefore the property, even though acquired by the insolvent after that date, is divisible among the insolvent's creditors under S. 52 (2) (a).

But I think the words of the order of discharge are too clear to admit of this construction. The order runs in the form prescribed by the rules of this Court and it is as follows:

"It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the 2nd day of October 1913."

The order therefore expressly grants his discharge from 2nd October 1913. Again the words of S. 38 (b), under which the order was made, imply that the discharge is granted though its operation is suspended. The word "operation" would have no meaning unless there were an order which did operate as a discharge. It is not the making of the order that is suspended but the operation of the order made. The Act makes no further proceedings necessary after an order of suspension under S. 38 has been passed.

If authority is needed, the case of *Dove In re, Bousfield v. Dove* (7) is very much in point. That was under the English Bankruptcy Act, 1847. Under that Act the order of discharge was made by grant of certificate of conformity, which was not effective until confirmed. An order was made suspending the grant of certificate of conformity in the following terms:

"The said Commissioner did adjudge, that the grant of certificate of conformity be suspended for the period of three years from the 30th day of June now last and ordered it to be adjourned to the 30th day of June which would be in the year 1851."

After this order, the new Act of 1849 abolished the necessity for the confirmation of the certificate. It was then held that the order operated as a discharge from 30th June 1851 and that the order was a final order, although in terms it adjourned the proceedings till that date. The Court said that the order of suspension of certificate was a grant of the certificate subject to such suspension. That is exactly the case here.

It is true that the practice of the Court is to require the insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension. Practice is a useful guide where a statute uses a language of doubtful import, but a practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful: *Balkaran Rai v. Gobind Nath Tiwari* (8).

The plaintiff is therefore entitled to the injunction he seeks and in the circumstances I direct that he do recover half his costs from the defendant.

I find on issue 1 in the affirmative.

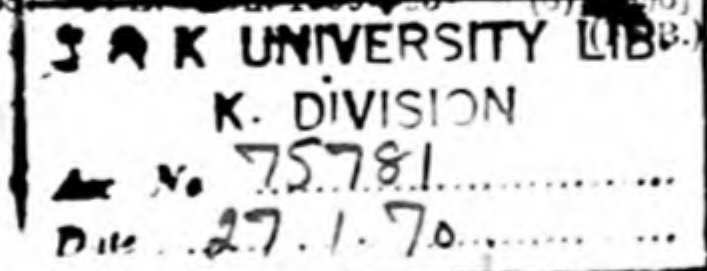
Decree for the plaintiff in terms of prayers (a) and (b) of the plaint and that plaintiff do recover half his costs from the defendant.

G.P./R.K.

Suit decreed.

(7) [1884] 27 Ch. D. 637—52 L. J. Ch. 1009—50 W. R. 197.

(8) [1906] 12 All. 129—(1890) A. W. N. 39



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END

